TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted] 5

GEORGE R. BLINN, RECEIVER OF THE PROPERTY OF MABEL ALLEN, OTHERWISE KNOWN AS MABEL E. ALLEN, AN ABSENTEE, PLAINTIFF IN ERROR,

vs.

GEORGE ELLA NELSON, ROBERT J. FISHER, EMMA E. THOMAS, ET AL.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED DECEMBER 18, 1909.

(21,451.)

(21,451.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 27, 909.

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a UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between George Ella Nelson, petitioner, Emma E. Thomas, Blanche Umback, John T. Sherburne and Robert J. Fisher, appellees, and George R. Blinn, Receiver of the property of Mabel Allen, otherwise known as Mabel E. Allen, an absentee, appellants, in a petition for distribution wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said George R. Blinn, Receiver, as aforesaid as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the twentieth day of November in the year of our Lord one thousand nine hundred and eight.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by
MARCUS P. KNOWLTON, *C. J., S. J. C.,*
Chief Justice of the Supreme Judicial
Court of Massachusetts.

b COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I, Walter F. Frederick Clerk of said Supreme Judicial Court have hereto set my hand and the seal of said Court this first day of December A. D. 1908.

[SEAL.] WALTER F. FREDERICK, *Clerk.*

1 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

To all persons to whom these presents shall come, Greeting:

Know ye, That among the Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk for the hearing of all causes, matters and things cognizable by a Supreme Court of Probate, between the first day of January in the year one thousand nine hundred and eight and the thirty-first day of December in the same year, both inclusive, it is thus contained, the following being the entire record in the case:

2 GEORGE ELLA NELSON, of Chicago, in the County of Cook and State of Illinois, Petitioner for an Order or Decree for Distribution of the Fund in the Hands of George R. Blinn, of Bedford, in the County of Middlesex, and Commonwealth of Massachusetts, Receiver of all of the Property of Mabel E. Allen, Otherwise Called Mabel Allen, Formerly of Boston, in the County of Suffolk and said Commonwealth, Appellee,

against

Said GEORGE R. BLINN, Receiver as Aforesaid, Appellant from a Decree of the Judge of Probate, at a Probate Court Holden at said Boston on the Twenty-fourth Day of June, A. D. 1907, Directing the said Receiver to Distribute the Property in his Hands in Accordance with the Terms of said Decree, the Record of the Proceedings in the Probate Court Being as Follows, to wit:

Certificate of Register.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Registry of Probate.

I, Elijah George, register of the probate court for said county of Suffolk, having by law the custody of the seal and all the records, books, documents, and papers of or appertaining to said court,

3 hereby certify the papers hereto annexed to be true copies of papers appertaining to said court, and on file and of record in the office of said court, to wit, the petition and decree relating to the appointment of George R. Blinn as receiver of the property and

estate of Mabel E. Allen, otherwise called Mabel Allen, an absentee, warrant and return, order of notice and return, receiver's bond, receiver's inventory, receiver's first account, petition for distribution and citations thereon, appearance of Amos L. Taylor, answer of respondents, decree on petition for distribution, and the claim of appeal from said decree.

In witness whereof I have hereunto set my hand and the seal of said court, this twenty-eighth day of June in the year of our Lord one thousand nine hundred and seven.

[SEAL.] ELIJAH GEORGE, *Register.*

Petition.

To the Honorable the Judges of the Probate Court in and for the County of Suffolk:

Respectfully represents George Ella Nelson of Chicago in the county of Cook and state of Illinois, that Mabel E. Allen, called Mabel Allen, a resident of Boston in this commonwealth, and having property therein, disappeared and absented herself from this
4 commonwealth within or prior to the year A. D. 1892; that she has left no agent therein, and her whereabouts are unknown; that she was a single woman; that said absentee was born in May, 1865, a house keeper by occupation, and resided in that part of said Boston called South Boston, which was her last known residence and address; that she disappeared on the date above named under the following circumstances, to wit, that on or about February 21, 1892, she was last seen at The Columbian Exposition at said Chicago, and was then ill with consumption, and that the names and residences of the family of the absentee and of other persons of whom inquiry may be made are as follows; viz.,—

Name.	Residence.	Relationship.
George Ella Nelson	12027 Wallace street, W. Pullman, Ill.	cousin.
Robert J. Fisher	1221 North 45th avenue, Chicago, Ill.	cousin.
Emma E. Thomas	Manchac, La.	cousin
Blanch M. Umback	New Orleans, La.	cousin.
John T. Sherburne	New Orleans, La.	cousin.

That a schedule of the property of said absentee within this commonwealth, real and personal, and its location, so far as known, is herein contained, and the same is all the property of said absentee known to your petitioner to be in this commonwealth; that your petitioner is a cousin of said absentee, and would be entitled to administer upon her estate if she were dead.

Wherefore your petitioner prays that said property may
5 be taken possession of by this court; that George R. Blinn of Bedford in the county of Middlesex, or some other suitable person, be appointed receiver of the same, and that a warrant issue therefor, and certifies that the statements herein contained are true to the best of her knowledge and belief.

Dated this 8th day of May A. D. 1905.

GEORGE ELLA NELSON.

STATE OF ILLINOIS,
Cook, ss:

Subscribed and sworn to this 8th day of May A. D. 1905.
Before me.
[SEAL.] WALTER G. DAVIS,
Notary Public.

Schedule of Property.

Schedule of Property of Mabel E. Allen, formerly of Boston, in said County of Suffolk, Absentee.

Real estate, none.
Personal estate, deposit book in Suffolk Savings Bank for Seamen and Others in the name of John W. McKim for the benefit of Mabel Allen, deposited December 7, 1899, with interest, $1633.
Filed May 13, 1905.

6 Probate Court.

BOSTON, *May* 13, 1905.

A warrant may issue.

JOHN W. McKIM,
Judge of Probate.

Warrant.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

[SEAL.]

Probate Court.

To the Sheriffs of our several Counties or their Deputies, Greeting:

You are hereby directed to take possession forthwith of all the following described property and personal estate of Mabel E. Allen, also called Mabel Allen, formerly of Boston in the county of Suffolk, absentee, and hold the same safely, subject to the order of the court; to wit.—

A certain deposit and accumulations thereof in the Suffolk Savings Bank for Seamen and others, amounting to sixteen hundred and thirty-three dollars and accumulations thereon, in the name of John W. McKim.

And you are also directed to make return of this warrant forthwith, with your doings thereon, and with a schedule of all property taken possession of by virtue hereof, together with your costs and expenses thereon.

In witness whereof I have hereunto set my hand, and caused the seal of said court to be affixed at Boston, this thirteenth day
7 of May in the year one thousand nine hundred and five.

JOHN W. McKIM,
Judge of Probate Court.

SUFFOLK, *ss:*

BOSTON, *June* 7, 1905.

By virtue of this precept I, on the 23rd day of May, 1905, at six minutes past ten o'clock A. M., demanded of the within-named Suffolk Savings Bank for Seamen and Others that they deliver to me the following personal estate of Mabel E. Allen, also called Mabel Allen; to wit,—

"A certain deposit and accumulations thereon in the Suffolk Savings Bank for Seamen and Others amounting to Sixteen Hundred and thirty three dollars and accumulations thereon in the name of John W. McKim," by delivering to H. Magoun, Esq., its treasurer and the officer in charge of its business, an attested copy of this precept with my said demand endorsed thereon, which said suffolk Savings Bank for Seamen and Others neglected and refused to do and still neglects and refuses to do to this day, viz., June 7 A. D. 1905.

ALBERT C. TILDEN,
Deputy Sheriff.

8 *Order of Notice.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Probate Court.

To Mabel E. Allen, also called Mabel Allen, an absentee, who formerly resided in Boston, in the county of Suffolk, having property in said county; to all persons claiming an interest in the property hereinafter named, and to all whom it may concern:

Whereas, a petition has been presented to said court to appoint George R. Blinn of Bedford in the county of Middlesex, or some other suitable person, receiver of the following-described property of said absentee, and whereas a warrant to take possession thereof has issued to an officer, who has made his return thereon;

You are hereby cited to appear at a probate court to be held at Boston in said county of Suffolk on the 20th day of July A. D. 1905, at ten o'clock in the forenoon, to show cause, if any you have, why the same should not be granted.

And the petitioner is hereby directed to give public notice thereof, by publishing this notice once in each week, for three successive weeks, in the "Boston Daily Advertiser," a newspaper published in said Boston, the last publication to be seven days at least before said court; and by posting a copy of this notice, not less than thirty days before said court, upon each parcel of land named herein, and in two or more conspicuous public places in Boston, the city
9 in which the absentee was last known to have been, and by mailing, postpaid, at least thirty days before said court, a copy of this notice to said absentee, addressed to her at South Boston her last known address.

Witness, John W. McKim, Esquire, judge of said court, this eighth day of June in the year one thousand nine hundred and five.

ELIJAH GEORGE, *Register.*

Return of Service.

I certify that I have served the foregoing notice as therein ordered, by publishing the same once in each week, for three successive weeks, in the "Boston Daily Advertiser," the last publication in each newspaper being seven days before said court, by posting a copy thereof upon each of said parcels of land and in two conspicuous places in the said city of Boston, and by mailing, postpaid, to the said absentee, on the 19th day of June, 1905, a copy of the same addressed to her at South Boston, *his* last known address.

GEO. R. BLINN.

SUFFOLK, *ss:*

JULY 20, *A. D.* 1905.

Personally appeared George R. Blinn, and made oath to the truth of the above return, by him subscribed.

Before me,

FRANK M. FORBUSH,
Justice of the Peace.

10 *Decree.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

At a probate court, holden at Boston, in and for said county of Suffolk, on the twentieth day of July in the year of our Lord one thousand nine hundred and five.

The petition of George Ella Nelson of Chicago, Ill., praying that George R. Blinn of Bedford in the county of Middlesex, or some other suitable person, be appointed receiver of certain property and estate of Mabel E. Allen, also called Mabel Allen, absentee, lying in said county of Suffolk, and described in the return of the officer, and the warrant and return thereon having been considered, after a hearing, it appearing that said Mabel E. Allen disappeared from this commonwealth within or prior to the year 1892, and that her whereabouts are unknown, and the said absentee and all other persons interested having been notified, according to the order of the court, to appear and show cause, if any they have, against the same, and no party objecting thereto, and it appearing that need for a receiver exists, it is found by the court and ordered to be recorded that the date of the disappearance of said absentee was within or prior to the year 1892.

And it is decreed that said George R. Blinn be appointed receiver of said property and estate described in said return, first giv-
11 ing bond, according to law, for the due performance of said trust, and that said officer transfer and deliver unto said receiver forthwith upon the filing and approval of his bond, all the property and estate named in the said officer's return.

ROBERT GRANT,
Judge of Probate Court.

Receiver's Bond.

Know all men by these presents, That We, George R. Blinn of Bedford in the county of Middlesex, as principal, and American Bonding Company of Baltimore, state of Maryland, having a usual place of business at Boston in the county of Suffolk, as surety, both within the commonwealth of Massachusetts, are holden and stand firmly bound and obliged unto John W. McKim, Esquire, judge of the probate court in and for the county of Suffolk, in the full and just sum of three thousand dollars, to be paid to said judge and his successors in said office; to the true payment whereof we bind ourselves and each of us, our and each of our successors, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the twentieth day of July in the year of our Lord one thousand nine hundred and five.

The condition of this obligation is such that if the above-
12 bounden George R. Blinn, receiver for all the property of Mabel E. Allen, also called Mabel Allen, lately resident in Boston in the county of Suffolk, an absentee, shall—

First, make and return to said probate court forthwith a true inventory of all the real and personal estate of said absentee that at the time of the making of the same shall have come to the possession of said receiver; and, at such time as it may order, a true inventory of such additional property which may come into his possession hereafter;

Second, manage and dispose of all such estate according to law and for the best interests of said absentee, and also the proceeds of any of the real estate of said absentee that may be sold or mortgaged by said receiver, and faithfully discharge his trust in relation to such estate and to the support and maintenance of his wife and minor children;

Third, render upon oath, at least once a year, until his trust is fulfilled, unless he is excused therefrom in any year by said court, a true account of the property in his hands, including the proceeds of all real estate sold or mortgaged by him, and of the management and disposition thereof, and also render such account at such other times as said court may order;

Fourth, obey all orders and decrees made by said court, and—

Fifth, at the expiration of his trust, settle his account in said court, or with said absentee, or *his* legal representatives, and pay
13 over and deliver all the estate remaining in his hands, or due from him on such settlement, to the person or persons lawfully entitled thereto, then this obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] GEO. R. BLINN.
[SEAL.] AMERICAN BONDING COMPANY OF BALTIMORE.
By BERTRAM G. WATERS,
Vice President.

Attest:
A. A. DORITY,
Assistant Secretary.

SUFFOLK, *ss:*

Examined and approved. JULY 20, *A. D.* 1905.

ROBERT GRANT,
Judge of Probate Court.

Receiver's Inventory.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

[SEAL.]

Probate Court.

To Amos L. Taylor, Greeting:

You are hereby appointed to appraise, on oath, the estate and effects of Mabel E. Allen, also called Mabel Allen, lately resident in Boston in said county of Suffolk, an absentee, which may be in said commonwealth. When you have performed that service, you will deliver this order, with your doings in pursuance thereof, to George R. Blinn, receiver for all the property of said absentee, that he may return the same to the probate court for said county of Suffolk.

Witness my hand and the seal of said court, this twentieth
14 day of July in the year of our Lord one thousand nine hundred and five.

ELIJAH GEORGE,
Register of Probate Court.

SUFFOLK, *ss:*

DECEMBER 4, A. D. 1905.

Then the above-named appraisers personally appeared and made oath that they would faithfully and impartially discharge the trust reposed in them by the foregoing order. Before me,

JOHN P. WYMAN,
Justice of the Peace.

Pursuant to the foregoing order to us directed, we have appraised said estate as follows; to wit,—

Amount of personal estate, as per schedule exhibited....	$2,003.11
Amount of real estate, as per schedule exhibited.....	0.00

AMOS L. TAYLOR, *Appraiser.*

SUFFOLK, *ss:*

DECEMBER —, A. D. 1905.

Then personally appeared George R. Blinn, receiver for all the property of said absentee, and made oath that the foregoing is a true and perfect inventory of all the estate of said deceased that has come to his possession or knowledge.

Before me,

JOHN P. WYMAN,
Justice of the Peace.

15 *Schedule of Real Estate in Detail.*

	Dolls.	Cts.
None	0	00

Schedule of Personal Estate in Detail.

	Dolls.	Cts.
Bank book #259159 Suffolk Savings Bank for Seamen and Others, interest computed to October 1905	2,003	11

Filed December 4, 1905.

Petition.

To the Honorable the Judge of the Probate Court in and for the County of Suffolk:

Respectfully represents George R. Blinn of Bedford in the county of Middlesex, that he is receiver of the property of Mabel Allen, otherwise called Mabel E. Allen, an absentee, late of Boston in said county of Suffolk; that by an order of said court, dated the 7th day of December, 1899, Charles E. Alexander, administrator with the will annexed of the estate of Jonathan Merry, late of said Boston, deceased, deposited the sum of sixteen hundred and thirty-three dollars in the Suffolk Savings Bank for Seamen and Others on the 9th day of November A. D. 1899, and by a further order of said court, dated October 14, 1902, deposited the further sum of twenty-two dollars, both in the name of the first judge of said court, to accumulate for the benefit of said Mabel Allen, otherwise called Mabel E. Allen; that your petitioner is receiver of the property of the person for whose benefit said deposit was made, and is en-
16 titled to said sums of sixteen hundred and thiry-three dollars and twenty-two dollars deposited as aforesaid, and to the accumulations thereon.

Wherefore your petitioner prays that said bank be ordered to pay to him said sums of sixteen hundred and thirty-three dollars and twenty-two dollars and the accumulations thereon.

Dated the 10th day of October A. D. 1905.

GEO. R. BLINN.

SUFFOLK, *ss:*

Subscribed and sworn to this 10th day of October A. D. 1905. Before me,

AMOS L. TAYLOR,
Justice of the Peace.

Allowed October 12, 1905.

Decree.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

At a probate court holden at Boston in and for the said county of Suffolk on the twelfth day of October in the year of our Lord one thousand nine hundred and five:

On the petition of George R. Blinn of Bedford, county of Middlesex, receiver of the property of Mabel Allen, otherwise called Mabel E. Allen, an absentee, praying that the sum of sixteen hundred and thirty-three dollars deposited in the name of the first judge of the probate court of the county of Suffolk, in the Suffolk Savings
17 Bank for Seamen and Others, on the 9th day of November, A. D. 1899, by the administrator with the will annexed of the estate of Jonathan Merry, late of Boston in said county, deceased, and the further sum of twenty-two dollars deposited in said bank October 14, 1902, with the accumulations thereon, may be paid over and transferred to him; it appearing that said petitioner is receiver of the property of the person entitled by law to receive the said sums, it is ordered that the said Suffolk Savings Bank for Seamen and Others pay over and transfer to said George R. Blinn, or his order, the sums of sixteen hundred and thirty-three dollars and twenty-two dollars deposited as aforesaid, with any accumulations which may have accrued thereon since the time when said deposits were made, and that the register of this court deliver to said petitioner the deposit book or other evidences of said deposits.

JAMES H. FLINT,
Acting Judge of Probate Court.

BOSTON, *October* 18, 1905.

Received the above-named deposit book, No. 259,159, covering both said deposits.

GEORGE R. BLINN,
By AMOS L. TAYLOR.

18 *Receiver's First Account.*

The First Account of George R. Blinn, Receiver of the Property of Mabel E. Allen, Called Mabel Allen, Formerly a Resident of Boston, in the County of Suffolk, an Absentee.

This account is for the period beginning with the 20th day of July A. D. 1905, and ending with the 1st day of March A. D. 1907.

Said accountant charges himself with the several amounts received, as stated in Schedule A, herewith exhibited	$2,073 83
And asks to be allowed for sundry payments and charges, as stated in Schedule B, herewith exhibited	122 58
Balance, as stated in Schedule C, herewith exhibited	$1,951 25

GEO. R. BLINN, *Receiver.*

Schedule A.

	Dolls.	Cts.
Amount of personal property, according to inventory, or Balance of next prior account	2,003	11
Amounts received from income, gain on sale of personal property over appraised value, and from other property, as follows:		
Cash rec'd, dividend on above sum to October, 1906	70	72
	2,073	83

19 *Schedule B.*

Showing Payments, Charges, Losses, and Distributions.

Date.		Dolls.	Cts.
1905.			
July 1	Cash paid sheriff—service of warrant	1	08
Aug. 2	" " Boston Daily Advertiser, citation	5	50
Nov. 2	" " copies of decree	1	00
Dec. 4	" " American Bonding Co. premium on bond	10	00
1906.			
Oct. 6	" " " " " " "	5	00
	Reserved for George R. Blinn, service as Receiver to date	100	00
		122	58

NOTE.—The above charges and expenses have not been paid from the funds of this estate for the reason that said Suffolk Savings Bank for Seamen and others, the depository of said funds, have refused to allow the Receiver to withdraw any of the funds, claiming that the statutes authorizing the appointment of such Receiver are unconstitutional. Hence, the above items, except that for services, have been paid by said Receiver personally.

Schedule C.

(This schedule contains all items of personal property now in possession of the accountant, including cash.)

Cash on deposit in Suffolk Savings Bank for Seamen and others	2,073	83
Deduct charges and expenses as per Schedule B	122	58
Balance	1,951	25

Filed March 14, 1907.

20 SUFFOLK, *ss:*

MARCH 14, A. D. 1907.

Then appeared the within-named George R. Blinn, and made oath that the within account is just and true.

Before me,

AMOS L. TAYLOR,
Justice of the Peace.

Petition.

To the Honorable the Judge of the Probate Court in and for the County of Suffolk:

Respectfully represents George Ella Nelson of Chicago, in the county of Cook and state of Illinois, that on July 20, 1905, upon her petition, George R. Blinn of Bedford in the county of Middlesex and commonwealth of Massachusetts was duly appointed by this honorable court as receiver of all the property of Mabel E. Allen, called Mabel Allen, formerly a resident of Boston in said county of Suffolk, an absentee, and said court found and recorded that the date of the disappearance of said absentee was "within or prior to 1892," all in accordance with the provisions of chapter 144 of the Revised Laws of this commonwealth and all acts amendatory thereto.

That said Blinn accepted said trust, and gave bond with surety in the sum of three thousand dollars, and on December 4, 1905, filed his inventory, showing that he had in his possession as receiver as aforesaid, the sum of two thousand and three dollars and eleven cents, being deposited in his name as receiver as aforesaid in
21 the Suffolk Savings Bank for Seamen and Others at said Boston.

That on March 14, A. D. 1907, said Blinn, as receiver as aforesaid, filed with the register of this court his first account, showing that he had on hand, after paying the expenses of his receivership to said date, the sum of nineteen hundred and fifty-one dollars and twenty-three cents, the same being on deposit in his name as receiver as aforesaid in said Suffolk Savings Bank for Seamen and Others.

That more than fourteen years have now passed since the date of disappearance of said absentee as found and recorded by the court, and said absentee has not appeared and has not been heard from by any one, and that more than one year has passed since the date of the appointment of said Blinn as receiver as aforesaid; that the time has now arrived for the distribution of the unexpended balance of the property in the hands of said receiver, after paying all expenses of administration, to the persons to whom, and in the shares and proportions in which, it would have been distributed if said absentee had died intestate within this commonwealth on the day fourteen years after the date of the disappearance as found and recorded by the court, whose names, places of residence, and relationship to said absentee are supposed and claimed to be as follows:

Name.	Residence.	Relationship.	Share.
George Ella Nelson.....	Chicago, Ill.....	Cousin	1/5
Robert J. Fisher.....	" "	"	1/5
Emma E. Thomas.....	Manchac, La.....	"	1/5
22			
Blanch M. Umback.....	New Orleans, La..	Cousin	1/5
John T. Sherburne.....	" " " ..	"	1/5

Wherefore your petitioner prays that distribution of said unexpended balance, less any charges and expenses of administration, may be decreed by this court among such persons as may be proved to be entitled thereto according to law, and especially according to the provisions of said chapter 144 and sections 10, 11, and 12 thereof, and all acts amendatory thereto.

Dated this 18th day of March, A. D. 1907.

GEORGE ELLA NELSON.

STATE OF ILLINOIS,
Cook, ss:

THIS 18TH DAY OF MARCH, A. D. 1907.

Then personally appeared the above-named George Ella Nelson, and made oath to the truth of the above representation according to the best of her knowledge and belief.

Before me,
[SEAL.]

WALTER G. DAVIS,
Notary Public.

Filed March 21, 1907.

Let citation issue for personal service on all known persons interested in this commonwealth, and by publication once a week for three successive weeks in the "Boston Daily Advertiser" and "Chicago Tribune," and mailing a copy of one such citation
23 to all persons known to be interested without this commonwealth, and to said Mabel E. Allen, addressed at said Boston and said Chicago.

JOHN W. McKIM,
Judge of Probate Court.

Citation.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Probate Court.

To the Next of Kin and All Others Interested in the Estate of Mabel E. Allen, also Called Mabel Allen, Formerly of Boston, in said County, an Absentee:

Whereas the first account of George R. Blinn, receiver of the property of said absentee, has been presented to said court for allow-

ance, and application has been made for a distribution of the balance in the hands of said receiver, after deducting charges and expenses, among the next of kin of said absentee:

You are hereby cited to appear at a probate court to be held at Boston in said county of Suffolk on the 25th day of April A. D. 1907, at 10 o'clock in the forenoon, to show cause, if any you have, why said account should not be allowed and distribution made according to said application.

And said petitioner is ordered to serve this citation by delivering a copy thereof to each person interested who can be found within
24 the commonwealth fourteen days at least before said court; by publishing the same in the "Boston Daily Advertiser" and the "Chicago Tribune," newspapers published in Boston and in Chicago in the state of Illinois, respectively, once in each week for three successive weeks, the last publication to be one day at least before said court, and by mailing, postpaid, a copy hereof to all known persons interested without the commonwealth and to the said Mabel E. Allen, addressed to her at said Boston and at said Chicago, fourteen days at least before said court.

Witness, John W. McKim, Esquire, judge of said court, this twenty-first day of March in the year one thousand nine hundred and seven.

ELIJAH GEORGE, *Register.*

I have caused to be served the foregoing citation as therein ordered, by publishing and mailing as therein ordered.

AMOS L. TAYLOR.

SUFFOLK, *ss:*

APRIL 30, *A. D.* 1907.

Then personally appeared Amos L. Taylor, and made oath to the truth of the above return, by him subscribed.

Before me,

FREDERICK J. FINNEGAN,
Justice of the Peace.

25 BOSTON, MASS., *May* 28, 1907.

This petition came on to be heard at this sitting, and it is ordered that further notice thereof be given in the same manner as heretofore ordered, directed "to Mabel E. Allen also called Mabel Allen, an absentee, who formerly resided in Boston in the County of Suffolk, having property in said County; to George R. Blinn of Bedford in the County of Middlesex, Receiver of said property; to all persons claiming an interest in said property; and to all to whom it may concern." In the meantime, said petition to stand continued to June 20, 1907.

ROBERT GRANT,
Judge of Probate.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Probate Court.

To Mabel E. Allen, also called Mabel Allen, an absentee, who formerly resided in Boston, in the county of Suffolk, having property in said county; to George R. Blinn, of Bedford, in the county of Middlesex, receiver of said property; to all persons claiming an interest in said property, and to all whom it may concern:

Whereas George Ella Nelson of Chicago in the state of Illinois has made application for a distribution of the balance in the hands of said receiver, after deducting charges and expenses, under sections 11 and 12 of chapter 144 of the Revised Laws:

You are hereby cited to appear at a probate court to
26 be held at Boston in said county of Suffolk on the 20th day of June, A. D. 1907, at 10 o'clock in the forenoon, to show cause, if any you have, why said distribution should not be made according to said application.

And said petitioner is ordered to serve this citation by delivering a copy thereof to the said George R. Blinn, and to each person interested who can be found within the commonwealth, fourteen days at least before said court; by publishing the same in the "Boston Daily Advertiser" and the "Chicago Tribune," newspapers published in Boston and in Chicago in the state of Illinois, respectively, once in each week for three successive weeks, the last publication to be one day at least before said court, and by mailing, postpaid, a copy hereof to all known persons interested without the commonwealth and to the said Mabel E. Allen, addressed to her at said Boston and at said Chicago, fourteen days at least before said court.

Witness, John W. McKim, Esquire, judge of said court, this first day of June in the year one thousand nine hundred and seven.

ELIJAH GEORGE, *Register.*

I have caused to be served the foregoing citation as therein ordered, by publishing and mailing and by delivering to George R. Blinn in hand a copy.

AMOS L. TAYLOR.

27 SUFFOLK, *ss:*

JUNE 21, *A. D.* 1907.

Then personally appeared Amos L. Taylor, and made oath to the truth of the above return, by him subscribed. Before me,

SARAH E. LYON,
Special Commissioner.

To the Register:

Please enter my appearance for Robert J. Fisher, John T. Sherburn, Emma E. Thomas, Blanche M. Umbach.

AMOS L. TAYLOR, *Attorney.*

Filed May 27, 1907.

Answer of Robert J. Fisher, Emma E. Thomas, and Blanche M. Umbach and John T. Sherburne.

And now come Robert J. Fisher of Chicago in the county of Cook and state of Illinois, Emma E. Thomas of Manchac, and Blanche M. Umbach and John T. Sherburne, all of New Orleans in the state of Louisiana, all named in the above petition as persons interested in the subject matter thereof, and say that they admit all the allegations set forth in said petition.

And they further say that the fund in the hands of the receiver was the share of the said Mabel E. Allen, distributed under the will of Jonathan Merry, late of Boston, Mass., deceased, under the following circumstances, to wit, said Merry, a merchant died in the year 1828, and on December 8, 1828, his will was duly proved and allowed by this court, and one Benjamin Dodd was appointed executor thereof; that said will

28 "All the rest, residue and remainder of my estate real and personal, I give to my children, Elizabeth Chapman, Jonathan Merry, Jr. Mary Ann Center, Nancy Gay Merry and John Hartt, Jr., child of my deceased daughter Lucy, equally, to be divided between them in equal shares and proportions or to their respective heirs and assigns forever;"

that said Dodd duly settled said estate.

On September 21, 1885, Charles E. Alexander of Brookline, Mass., was duly appointed by this court administrator de bonis non cum testamento annexo of the estate of said Jonathan Merry for the purpose of collecting from the United States government certain claims of said deceased known as the "French Spoliation Claims;" that the inventory of said Alexander, filed June 22, 1899, shows that he received the sum of $27,236.46 therefor. This sum he distributed, after deducting charges and expenses, among the residuary legatees above named, or their respective heirs, under the direction of this court, as shown by his accounts, duly allowed June 29, 1899, November 10, 1899, and March 26, 1900. That it appears from said first account, and from the petition for distribution filed February 3, 1900, that said Mabel Allen was interested in said estate she being a great granddaughter of said Jonathan Merry and a granddaughter of said Elizabeth Chapman, who was one of the residuary legatees above mentioned, and that the share of said Allen in said fund was $1633, and, as appears by subsequent accounts,

29 the further sum of $22.

That on December 7, 1899, upon the petition of said Alexander alleging that the whereabouts of said Allen were unknown, this court ordered that said sum of $1633 be deposited in the Suffolk Savings Bank for Seamen and Others in the name of John W. McKim, judge of probate, to accumulate for the benefit of the persons entitled thereto, and that on October 14, 1902, the said further sum of $22 was likewise ordered to be so deposited.

That on July 20, 1905, said George R. Blinn was duly appointed by this court receiver of the property and estate of said Mabel E.

Allen, an absentee, under the provisions of chapter 144 of the Revised Laws of this commonwealth, and all acts amendatory thereof and in addition thereto, and gave bond. On October 12, 1905, upon the petition of said Blinn as receiver as aforesaid, this court ordered said fund deposited in the name of John W. McKim, as aforesaid, to be turned over to said Blinn, as receiver as aforesaid, and that he now holds said sum, with interest thereon, amounting in all to $2073.83, which is on deposit in said bank in his name as receiver as aforesaid.

That said Mabel E. Allen was born at New York in May, 1865, and was the only child of Emma Sherburne Allen and Joseph C. Allen; that she and her mother, during the early years of her life, resided at South Boston, Mass.; her mother died when she was about five years old. Thereafter she resided at South Boston, for
30 a time with a friend named Mrs. Annie De Foe, and became a housekeeper and trained nurse. That for some time prior to 1891 she resided and had been employed at said South Boston, address unknown. That she was last seen at said Chicago, on or about February 21, 1892, when she called upon the petitioner, and was then unmarried and ill with consumption. That one Mrs. Julia Carlisle, whose last known address was 3 Fair street, New Haven, Conn. (in 1891), was her friend, but whose address and whereabouts are and have been for a long time unknown. That since 1899, to the present time, the petitioner, the receiver, and the other persons interested have made many efforts to find the said Mabel E. Allen, or learn something of her disappearance, but have found no trace of her whatever after February, 1892, as aforesaid. That the date of her disappearance as found and recorded by this court was "within or prior to the year 1892."

That her father, said Joseph C. Allen, was a veteran of the civil war, and for a time was an inmate of the Fitch Home for Soldiers and Soldiers' Hospital of Connecticut, which he left during December, 1891, and went to New York city, where he died on or about January 8, 1892, leaving no father or mother and never having had brothers or sisters.

That her mother, said Emma Sherburne Allen, had one brother and one sister; the brother, Thomas Paine Sherburne, died April 6, 1876, leaving as his sole children said John T. Sherburne,
31 Emma E. Thomas, and Blanche M. Umbach, who are all now living. The sister, Elizabeth Sherburne Davis Fisher, died May 9, 1900, leaving as her sole children the petitioner, said George Ella Nelson, and said Robert J. Fisher, who are both now living. Consequently, said George Ella Nelson, Robert J. Fisher, John T. Sherburne, Emma T. Thomas, and Blanche M. Umbach are all cousins of said Mabel E. Allen, and also her next of kin and the sole persons to whom the property of the said Mabel E. Allen would have been distributed had she died intestate within this commonwealth on the day fourteen years after the date of her disappearance, as found and recorded by this court, and that they are now entitled to have said estate distributed to them in the proportions of one fifth each, after paying all charges and expenses of ad-

ministration, in accordance with the provisions of chapter 144, as aforesaid.

Wherefore said Robert J. Fisher, Emma E. Thomas, and Blanche M. Umbach and John T. Sherburne join with the petitioner in praying that a distribution of said estate now in the hands of said Blinn as receiver as aforesaid, less any charges and expenses of administration, may be decreed by this court and that one fifth part of such unexpended balance may be paid to each of them.

ROBERT J. FISHER,
EMMA E. THOMAS,
BLANCHE M. UMBACH,
JOHN T. SHERBURNE,
By Their Attorney, AMOS L. TAYLOR.

Filed May 27, 1907.

32 *Decree.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Probate Court.

At a probate court holden at Boston, in and for said county of Suffolk, on the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and seven.

On the petition of George Ella Nelson, praying for a decree of distribution of the balance of the estate in the hands of George R. Blinn, receiver of the property of Mabel E. Allen, called Mabel Allen, an absentee, formerly of Boston in said county of Suffolk, after deducting charges and expenses, among the persons entitled thereto, pursuant to the provisions of section- 11 and 12 of chapter 144 of the Revised Laws of this commonwealth, and public notice of said petition having been given to the said George R. Blinn, to the said Mabel E. Allen, and to all persons interested, according to the orders of this court; it appearing to the court that all the allegations contained in said petition and in the answer of the several respondents are true, and that there are in the hands of said receiver all the funds of said estate, to wit, two thousand seventy-three and 83/100 dollars ($2073.83), and that the following persons are entitled thereto, after reserving therefrom the amount or amounts as hereinafter provided, in the proportions specified, as follows:

33 George Ella Nelson, one fifth.
Robert J. Fisher, one fifth.
Emma E. Thomas, one fifth.
Blanche M. Umbach, one fifth.
John T. Sherburne, one fifth.

It is decreed that said sum, after reserving therefrom the amount or amounts necessary for the payment of services and charges of said receiver, and any and all expenses and fees incidental to his said

receivership and incidental to these proceedings, be distributed among them, and that an order for such distribution be issued accordingly, with the direction to deposit in the Suffolk Savings Bank for Seamen and Others, in the name of the judge of probate, any sums remaining after six months.

ROBERT GRANT,
Judge of Probate.

Claim of Appeal.

To the Honorable the Judge of the Probate Court in and for the County of Suffolk:

Represents George R. Blinn of Bedford in the county of Middlesex, that he is receiver of the property of Mabel E. Allen, an absentee, formerly of Boston in the county of Suffolk, and as such is interested in the estate of said absentee; that he is aggrieved by a decree of the probate court held at Boston in said county of Suffolk
on the 24th day of June A. D. 1907, whereby said court
34 decreed that all the funds of said absentee in the hands of said receiver, after reserving therefrom the amount or amounts necessary for the payment of services and charges of said receiver, and any and all expenses and fees incidental to said receive-ship and incidental to the proceedings upon which said decree was entered, be distributed as follows:

To George Ella Nelson, one fifth, Robert J. Fisher, one fifth, Emma E. Thomas, one fifth, Blanche M. Umbach, one fifth, and John T. Sherburne, one fifth, with the direction to deposit in the Suffolk Savings Bank for Seamen and Others, in the name of the judge of probate, any sums remaining after six months, all pursuant to the provisions of sections 11 and 12 of chapter 144 of the Revised Laws of this commonwealth.

And he hereby gives notice that he claims an appeal from said decree to the Supreme Judicial Court.

Dated this 25th day of June, A. D. 1907.

GEO. R. BLINN.

Filed June 25, 1907.

From which decree the said George R. Blinn, Receiver, appealed to this court, being the Supreme Court of Probate for said Commonwealth, and entered his appeal in the clerk's office of said court on the second day of July A. D. 1907, and thereupon the parties appeared.

And the appellant filed in this court at the time of the entry of his said appeal; the following objections to said decree, to wit:

35 *Objections of George R. Blinn, Receiver.*

And now comes George R. Blinn, the appellant above named, and for objection says,—

1. That chapter 144 of the Revised Laws of this commonwealth, and especially sections 10, 11, and 12 thereof, is unconstitutional

and void, as being contrary to the provisions of article 10 of part 1 of the constitution of this commonwealth.

2. That said chapter 144, and especially sections 10, 11, and 12 thereof, is unconstitutional and void as being contrary to the provisions of the fourteenth amendment to the Constitution of the United States of America.

3. That said decree of the probate court is void for the reason that it deprives said absentee of her property without due process of law.

4. That said absentee has not been absent from this commonwealth and unheard from and her whereabouts unknown a sufficient length of time to warrant a proper and legal final distribution of her property within this commonwealth.

5. That said decree makes no provision for the recovery of said funds of said absentee should she ever return and claim the same, and makes no provision for security for such repayment by the distributees.

6. That the notice given to the said absentee of said petition for distribution is not sufficient.

GEO. R. BLINN.

36 And on the said second day of July A. D. 1907, the said cause is reserved for the consideration and determination of the full court by report of the pending justice, said report being in the words following, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Probate.

GEORGE ELLA NELSON, Appellee,
v.
GEORGE R. BLINN, Receiver, Appellant.

Report.

This is a petition originally filed in the probate court for the county of Suffolk, asking that a distribution of the estate of Mabel E. Allen, called Mabel Allen, formerly of Boston in said county, an absentee, in the hands of George R. Blinn of Bedford in the county of Middlesex, receiver of said estate, appointed by said probate court, after deducting therefrom charges and expenses for said receivership, be made pursuant to the provisions of chapter 144 of the Revised Laws of this commonwealth, and especially sections 10, 11 and 12 thereof, and all acts in amendment thereto.

The petition was filed March 21, 1907, and a special order for citation was made thereon, and citation issued. The petition came on for hearing on May 28, 1907, when said court ordered
37 further notice to be given by a new citation, and continued the case to June 20, 1907. Copies of said orders and said citations, with the return of service thereon, are with the accom-

panying papers. On June 24, 1907, a decree, granting the prayers of said petition, was entered by said probate court. The said receiver appealed from said decree on June 25, 1907, which appeal was duly entered in the Supreme Judicial Court. Copies of the entire record of said case in said probate court, and in this court are hereto annexed and made a part of this report; to wit,—

Petition for the appointment of said receiver, warrant and return thereon, citation issued on said petition and return thereon, decree appointing the receiver, receiver's bond, petition of receiver and decree thereon for payment of deposit, warrant for inventory and appraiser's return, the receiver's first account, said petition for distribution of said estate, two orders for citations and the citations issued with the return of service thereon appearance of Amos L. Taylor for respondents Robert J. Fisher, John T. Sherburne, Emmas E. Thomas, and Blanche M. Umbach, and answer of all said respondents, appearance of George R. Blinn in opposition, the decree for distribution, the receiver's claim of appeal therefrom, and receiver's objections to said decree.

At the hearings before said probate court and before this court no persons were present or represented by counsel other than the above-named petitioner and the above-named respondents,
38 who joined in asking that the prayers of the petitioner be granted, together with the said George R. Blinn, receiver, in opposition. No notice has been given of these proceedings other than that required by said citations issued as above.

This case came on to be heard in the Supreme Judicial Court for said county of Suffolk, and at the request of all parties represented, as above, I report the case upon the petition and answer and the entire record of said case, which has been made a part hereof, for the consideration of the Supreme Judicial Court for the commonwealth.

Such decree is to be entered or other disposition made of the case as to the full court shall seem meet and as equity and justice may require.

JOHN W. HAMMOND, *J. S. J. C.*

And upon the twenty sixth day of February A. D. 1908, a rescript was received and placed on file in the office of the clerk of this court, the same being in the words following, to wit:

COMMONWEALTH OF MASSACHUSETTS.
Supreme Judicial Court for the Commonwealth:

At BOSTON, *Feb.* 25, 1908.

In the case of

GEORGE ELLA NELSON, Appellee,
vs.
GEORGE R. BLINN, Receiver,

pending in the Supreme Judicial Court for the County of Suffolk:

39 Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—

Decree affirmed.

By the Court

C. H. COOPER, *Clerk.*

February 25, 1908.

Brief Statement of the Grounds and Reasons of the Decision.

The statute is constitutional.

And on the nineteenth day of November A. D. 1908, the following decree was entered, to wit:

Final Decree.

This cause came on to be further heard after rescript from the Supreme Judicial Court for the Commonwealth, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the decree of the Probate Court for the County of Suffolk, dated June 24th, A. D. 1907, be and the same hereby is affirmed, and that this cause be remitted to said Probate Court for final distribution and further proceedings in accordance with said decree.

By the Court:

WALTER F. FREDERICK, *Clerk.*

November 19, 1908.

40 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said Court to be hereunto affixed.

Witness, Marcus Perrin Knowlton, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston in said County of Suffolk, this first day of December in the year of our Lord one thousand nine hundred and eight.

[SEAL.] WALTER F. FREDERICK, *Clerk.*

41 COMMONWEALTH OF MASSACHUSETTS:

I, Marcus Perrin Knowlton, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that Walter F. Frederick, Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797,

as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this first day of December in the year one thousand nine hundred and eight.

[SEAL.] MARCUS P. KNOWLTON.

42 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Walter F. Frederick, Clerk of the Supreme Judicial Court within and for said County of Suffolk, hereby certify that the Honorable Marcus Perrin Knowlton, by whom the foregoing certificate was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Chief Justice of the Supreme Judicial Court of said Commonwealth, duly commissioned and qualified; to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this first day of December in the year of our Lord one thousand nine hundred and eight.

[SEAL.] WALTER F. FREDERICK.

43 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *November* 24, 1908.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of George E. Nelson vs. George R. Blinn decided on the 25th day of February, 1908.

HENRY W. SWIFT,
Reporter of Decisions.

44 KNOWLTON, *C. J.:*

The appellant was appointed the receiver of the estate of an absentee from the Commonwealth, under the R. L. c. 144, as amended by the St. 1904, c. 206. After due proceedings in the management and settlement of the estate of the absentee, more than fourteen years having elapsed since the time of her disappearance as found and recorded by the court, a petition for distribution of the estate was filed in the Probate Court, and after proper notice and regular proceedings a decree was made ordering a distribution in accordance with the prayer of the petition. The case is before us on an appeal, and the only question raised is whether the statute referred to is constitutional.

The appellant relies upon art. 10 of the Declaration of Rights, which guarantees to every individual protection in the enjoyment of his life, liberty and property, and upon the Fourteenth Amendment to the Constitution of the United States, which declares that
45 no State shall deprive any person of life, liberty or property without due process of law. As applied to a case like the

present, the prohibition in the amendment just referred to is as broad as the general provision in the Constitution of Massachusetts.

The unanimous opinion of the justices of the Supreme Court of the United States upon a similar statute, in the case of Cunnius v. Reading School District, 198 U. S. 458, may be treated as a sufficient authority, except so far as the different provisions of the statutes modify the questions involved. That case arose upon a statute of Pennsylvania, whose constitutionality was sustained by a unanimous decision of the Supreme Court of that State, reported in 206 Penn. St. 469. In each decision a distinction was pointed out between those statutes which authorize a settlement of the estate of a deceased person, under which the proceedings are void and the whole jurisdiction gone if the person is in fact alive, and statutes like the present, in which a State undertakes to deal with property within its jurisdiction when its owner has abandoned it, or for some other reason cannot be found. Said Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in the case just cited, "It is a wise and just statute of sequestration and conservation of property which is without a known owner, whether the late owner has abandoned it (as in the present case) or the title has devolved upon others by his death, not being presently ascertainable. The statute steps in to provide a caretaker and to vest present benefit in
46 those who appear to be the owners, with as complete provision as is practicable for the re-establishment of the rights and possession of the absentee on his reappearance. That the State must have some such power is manifest. The property is within its jurisdiction and under its protection. It is not in the interests of order or good government that property should lie ownerless or open to conflicting claims. If the absentee be really dead it is conceded that the proceeding is unimpeachable. But if he is dead, so far as can be learned, though the death be not absolutely proved, yet the effect to the State is the same, there is property in its charge, without a recognized owner. It must have power to meet such a case, or one of its chief functions as a government must go unperformed." The subject is very fully and ably considered by Mr. Justice White in giving the opinion of the Supreme Court of the United States in the same case, and the legality and propriety of the exercise of this governmental right is established historically as well as by sound reasoning. In view of these decisions the case of Carr v. Brown, 20 R. I. 215, and Clapp v. Houg, 12 N. D. 600, so far as they present a different view, should not be followed.

In the fundamental principles upon which the law rests there is no difference between the statute in Massachusetts and that in Pennsylvania. Each alike makes a reasonable provision for notice. As the proceeding is in its nature in rem, a personal notice to the absentee, which in most cases would be impossible, is not necessary to its validity. The constitutionality of our statute was as-
47 sumed by the parties and the court in George v. Clark, 186 Mass. 426, and in Purdon v. Blinn, 192 Mass. 387.

The only part of our statute that is not covered by the decision of the Supreme Court of the United States is that which relates to

the distribution of the property. As bearing upon that the language of Mr. Justice Mitchell in 206 Penn. St. 469, 475 is pertinent. He says: "But there must be a limit beyond which the State is not bound to have its laws set at defiance by the whim of an individual, and property kept in abeyance as to its ownership. If a child having title to property is taken out of the State and never heard of again, it would be nearly a century before it could be said with certainty that such owner was dead. The State is not bound to have the regular and lawful use and ownership of property subjected to such restrictions and uncertainty. If a fair and reasonable provision is made for the protection of the owner in case of his reappearance the State has not exceeded its constitutional powers."

The statute in Pennsylvania provides that a distribution of the estate of the absentee may be made in proceedings commenced after he has been absent and his whereabouts have been unknown for seven years, and it would seem that the estate might be settled and the distribution ordered within a comparatively short time after the expiration of the seven years. Upon such distribution the distributees must give security, to be approved by the court, that they will refund the amounts received with interest, should the
48 absentee in fact be alive; but if they are not able to give such security, the money is to be put at interest, and the interest paid only to the distributees until security has been given, or until "the court on application shall order it to be paid to the person or persons entitled to it." Under this statute there is nothing to prevent the court from ordering the whole estate paid over to the distributees, without security, long before the expiration of fourteen years from the time of the absentee's disappearance. The principal difference between the two statutes is that, under this in Pennsylvania, the whole property might be distributed without security, if the court should order it, within a period that might not be more than nine or ten years from the disappearance of the absentee, while under our statute no distribution can be made before the expiration of fourteen years from his disappearance, at which time all his rights to the property are barred by the statute. This last is, of course, a statute of limitations. Viewed as such, if it is not unreasonable in the length of time which it gives an owner in which to recover his property within the jurisdiction of the State, it is not unconstitutional. Call v. Hagger, 8 Mass. 423. Mulvey v. Boston, ante, 178. One who wishes to preserve his right to property not in his possession must act with reasonable diligence in the assertion of his right. As to most kinds of personal property he is barred by our statutes at the expiration of six years from the time when he might have taken formal proceedings for his protection. A disseisin of him, continued for twenty years, deprives him of his real estate. As to property abandoned or left unclaimed or uncared for within the Commonwealth, the Legislature may well
49 exercise the jurisdiction of the State to take it in charge and administer it, and may prescribe a reasonable time as a limitation of the right of the owner to reclaim it. The question how long a time must be allowed, in the interest of the owner, and

in the interest of those claiming under him, as well as in that of the general public, is primarily for the Legislature to decide. Something might depend upon the internal condition of the State, as to the nature and density of the population, the kinds of business which are most followed, and other local considerations with which the Legislature would be familiar. In regard to such a kind of jurisdiction as is exercised under this statute, and the effect of long delay and uncertainty as to the ownership of property in the hands of a receiver, we cannot say that the Legislature might not properly enact that one's rights of property within our jurisdiction should be lost if he is absent for fourteen years without attempting to exercise them. In some respects this statute is more considerate of the rights of absentees than the statute of Pennsylvania which was held constitutional, while in other respects the other is more liberal. We cannot say that it was beyond the constitutional power of the Legislature to enact.

Decree affirmed.

50 [Endorsed:] George E. Nelson vs. George R. Blinn. Certified copy of the opinion of the Supreme Judicial Court.

51 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Probate.

GEORGE R. BLINN, Receiver, Plaintiff in Error,
vs.
GEORGE ELLA NELSON et als., Defendants in Error.

Petition for Writ of Error.

To the Honorable Marcus P. Knowlton, Chief Justice of the Supreme Judicial Court of said Commonwealth:

Respectfully represents George R. Blinn, of Bedford in the County of Middlesex and Commonwealth of Massachusetts, *as* he is Receiver of the property of Mabel Allen, otherwise known as Mabel E. Allen, formerly of Boston in the County of Suffolk and said Commonwealth, an absentee.

That on or about November 19, A. D. 1908, the Supreme Judicial Court of the Commonwealth of Massachusetts, for the County of Suffolk, made and entered a final decree against your petitioner in a certain cause, wherein George Ella Nelson of Chicago, in the County of Cook and State of Illinois, was petitioner, and your petitioner, together with Robert J. Fisher of said Chicago, Emma E. Thomas of Manchac, in the State of Louisiana, Blanche Umbach and John T. Sherburne, both of New Orleans in said State of Louisiana, were respondents, all as will more fully appear by reference to the
52 record and proceedings in said cause, in which final decree and the proceedings had prior thereto, certain errors were

committed to the prejudice of your petitioner, all of which will appear more in detail from the assignments of errors which is filed with this petition.

That said Supreme Judicial Court is the highest court of record of said Commonwealth of Massachusetts, in which a decision in this cause and matter could be had, and that certain federal questions have been raised by said final decree.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Judicial Court of the Commonwealth of Massachusetts for the correction of errors so complained of and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to said Supreme Court of the United States.

Dated this twentieth day of November, A. D. 1908.

GEO. R. BLINN,
Receiver of the Property of Mabel Allen, Otherwise Called Mabel E. Allen, an Absentee.

A true copy.
Attest:
WALTER F. FREDERICK, *Clerk.*

53 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Probate.

GEORGE R. BLINN, Receiver, Plaintiff in Error,
vs.
GEORGE ELLA NELSON et als., Defendants in Error.

Assignments of Errors.

And now comes said George R. Blinn, Receiver the plaintiff in error, and respectfully submits that in the record, proceedings and decision and final decree of the Supreme Judicial Court of the Commonwealth of Massachusetts in the above entitled matter, there are manifest errors in this, to wit:

1. The Court erred in holding that the provisions of chapter 144 of the Revised Laws of said Commonwealth as amended by chapter 224 of the Acts of 1906, and by chapter 175 of the Acts of 1906, and especially sections 10, 11 and 12 thereof, are not in conflict with, and in violation of, the provisions of the 14th amendment to the Constitution of the United States of America, for that said Commonwealth of Massachusetts, by and through said statutes, and especially sections 10, 11 and 12 thereof, assumes and seeks:

a. To deprive the plaintiff in error and said Mabel E. Allen, represented by him, and certain other persons, of rights, privileges and immunities, secured to them as citizens of the United States
54 of America and of said Commonwealth of Massachusetts.

b. To deprive the plaintiff in error and said Mabel E. Allen, represented by him, and certain other persons, of the liberty

and property secured to them as citizens of the United States of America and of said Commonwealth of Massachusetts.

c. To deprive and to deny the plaintiff in error and said Mabel E. Allen, represented by him, and certain other persons, the equal protection of the law, secured to them as citizens of the United States of America and of said Commonwealth of Massachusetts.

2. The Court erred in holding that the provisions of chapter 144 of the Revised Laws of said Commonwealth, as amended by Chapters 175 and 224 of the Acts of 1906, and especially sections 10, 11 and 12 thereof, are not in conflict with, and in violation of, the provisions of the 5th amendment to the Constitution of the United States of America, for that said Commonwealth of Massachusetts, by and through said statutes, and especially sections 10, 11 and 12 thereof, assumes and seeks to deprive the plaintiff in error, and the said Mabel E. Allen, represented by him, and certain other persons, of liberty and property, without due process of law, secured to them as citizens of the United States of America, and of said Commonwealth of Massachusetts.

3. The Court erred in holding that by the provisions of
55 chapter 144 of the Revised Laws of said Commonwealth, as amended by chapters 175 and 224 of the Acts of 1906, and especially sections 10, 11 and 12 thereof, the plaintiff in error, and said Mabel E. Allen, represented by him, are not deprived of liberty and property without due process of law.

4. The Court erred in holding that by the provisions of chapter 144 of the Revised Laws of said Commonwealth, as amended by chapters 175 and 224, of the Acts of 1906, and especially sections 10, 11 and 12 thereof, the plaintiff in error and Mabel E. Allen, represented by him, are not deprived of rights, privileges and immunities secured to them as citizens of the United States of America and of said Commonwealth of Massachusetts.

5. The Court erred in holding that by the provisions of chapter 144 of the Revised Laws of said Commonwealth, as amended by chapters 175 and 224, of the Acts of 1906, and especially sections 10, 11 and 12 thereof, the plaintiff in error and said Mabel E. Allen, represented by him, are not denied the equal protection of the law.

6. The Court erred in holding that chapter 144 of the Revised Laws of said Commonwealth, as amended by chapters 175 and 224 of the Acts of 1906, and especially sections 10, 11 and 12 thereof, and the authority authorized to be exercised thereunder, are within the Police Power of the Legislature of said Commonwealth of Massachusetts.

7. The Court erred in holding that the distribution of the fund in the hands of the plaintiff in error, as Receiver of the prop-
56 erty of Mabel E. Allen, should be made in accordance with the decree of the Probate Court for the County of Suffolk, dated June 24th, A. D. 1907; also in holding that such distribution and the order therefor does not deprive the plaintiff in error and said Mabel E. Allen, represented by him, of their liberty and property without due process of law; also that such distribution and the order therefor does not deny to the plaintiff in error and said Mabel E.

Allen, represented by him, the equal protection of the law; also that such distribution and the order therefor does not deprive the plaintiff in error and said Mabel E. Allen, represented by him of the rights, privileges and immunities secured to them by the Constitution of the United States of America.

GEO. R. BLINN,
Receiver of the Property of Mabel Allen, Otherwise Called Mabel E. Allen, an Absentee.

A true copy.
Attest:
WALTER F. FREDERICK, *Clerk.*

57 United States Circuit Court of Appeals for the First Circuit.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to George Ella Nelson, Robert J. Fisher, Emma E. Thomas, Blanche Umbach, and John T. Sherburne, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States *Circuit* in the city of Washington, D. C., on the* nineteenth day of December next, pursuant to an Appeal duly obtained from a decree of the† Supreme Judicial Court *Court* of Massachusetts, wherein George R. Blinn, Receiver of the property of Mabel Allen, otherwise called Mabel E. Allen, an absentee, is the plaintiff in error, and you are the defendants in error to show cause, if any there be, why the said decree, entered against the said plaintiff in error, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Marcus P. Knowlton, Chief Justice of the Supreme Judicial Court of Massachusetts this twentieth day of November, in the year of our Lord one thousand nine hundred and eight.

MARCUS P. KNOWLTON,
Chief Justice of the Supreme Judicial Court of Massachusetts.

* Not exceeding 30 days from the day of signing.
† Name of court in which the decree is entered.

58 Service of the within citation is hereby acepted.

GEORGE ELLA NELSON,
ROBERT J. FISHER,
EMMA E. THOMAS,
BLANCHE UMBACH, AND
JOHN T. SHERBURNE,
By Their Attorney, AMOS L. TAYLOR.

59 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

I, Walter F. Frederick, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, hereby certify that the papers hereunto annexed are an exemplification of the Record in the case of

GEORGE ELLA NELSON, Petitioner,
against
GEORGE R. BLINN, Receiver, Appellant,

in said Supreme Judicial Court determined, and attached thereto and transmitted with said Record are attested copies of the opinion of the full court, and application for writ of error, and the original citation with the acceptance of service endorsed thereon.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Boston, this first day of December in the year of our Lord one thousand nine hundred and eight.

[SEAL.] WALTER F. FREDERICK, *Clerk.*

60 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Probate.

GEORGE R. BLINN, Receiver, Plaintiff in Error,
vs.
GEORGE ELLA NELSON et als., Defendants in Error.

Waiver of Surety or Sureties on Bond of Plaintiff in Error.

And now come George Ella Nelson, Robert J. Fisher, Emma E. Thomas, Blanche Umbach and John T. Sherburne, defendants in error in the above entitled action, and hereby request that the plaintiff in error need not be required to furnish a surety or sureties upon his bond to prosecute his writ of error to effect and answer all damages and costs if he fails to make good his plea, hereby expressly waiving such surety or sureties.

GEORGE ELLA NELSON,
ROBERT J. FISHER,
EMMA E. THOMAS,
BLANCHE UMBACH,
JOHN T. SHERBURNE,
By Their Attorney, AMOS L. TAYLOR.

A true copy.
Attest: WALTER F. FREDERICK, *Clerk.*

61 *Bond on Writ of Error.*

Know all Men by these Presents, That I, George R. Blinn of Bedford, in the County of Middelsex and Commonwealth of Massachusetts, am held and firmly bound unto George Ella Nelson, and Robert J. Fisher, both of Chicago, in the State of Illinois, Emma E. Thomas of Manchac Planche Umbach and John T. Sherburne both of New Orleans, the last three being in the State of Louisiana in the full and just sum of five hundred (500) dollars, to be paid to the said George Ella Nelson, Robert J. Fisher, Emma E. Thomas, Blanche Umbach and John T. Sherburne, their certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, by these presents.

Sealed with my seal and dated this twentieth day of November in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a term of the Supreme Judicial Court held at Boston in the County of Suffolk and Commonwealth of Massachusetts, on the nineteenth day of November, A. D. 1908, in a suit depending in said Court, between George Ella Nelson, Robert J. Fisher, Emma E. Thomas, Blanche Umbach and John T. Sherburne, Appellants, and George R. Blinn, Receiver of the property of Mabel Allen, otherwise known as Mabel E. Allen, an absentee, decree was rendered against the said George R. Blinn, Receiver as aforesaid and the said George R. Blinn, Receiver as aforesaid having procured a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said George Ella Nelson, Robert J. Fisher, Emma E. Thomas, Blanche Umbach and John T. Sherburne citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such, That if the said George R. Blinn, Receiver as aforesaid shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

GEO. R. BLINN. [SEAL.]

Sealed and delivered in presence of
AMOS L. TAYLOR.

Approved:
MARCUS P. KNOWLTON, *C. J., S. J. C.,*
Chief Justice of the Supreme Judicial
Court of Massachusetts.

A true copy.
Attest:

WALTER F. FREDERICK, *Clerk.*

Endorsed on cover: File No. 21,451. Massachusetts supreme judicial court. Term No. 314. George R. Blinn, Receiver of the property of Mabel Allen, otherwise known as Mabel E. Allen, an absentee, plaintiff in error, vs. George Ella Nelson, Robert J. Fisher, Emma E. Thomas et al. Filed December 18th, 1908. File No. 21,451.

23

Office Supreme Court, U. S.
FILED.
MAR 20 1911
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted] 5

GEORGE R. BLINN, RECEIVER OF THE PROPERTY OF MABEL ALLEN, OTHERWISE KNOWN AS MABEL E. ALLEN, AN ABSENTEE, PLAINTIFF IN ERROR,

v.

GEORGE ELLA NELSON ET AL.

BRIEF FOR GEORGE R. BLINN, RECEIVER, PLAINTIFF IN ERROR.

GEORGE R. BLINN,
Receiver, pro se.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 116.

GEORGE R. BLINN, RECEIVER OF THE PROPERTY OF MABEL ALLEN, OTHERWISE KNOWN AS MABEL E. ALLEN, AN ABSENTEE, PLAINTIFF IN ERROR,

v.

GEORGE ELLA NELSON ET AL.

BRIEF FOR GEORGE R. BLINN, RECEIVER, PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This petition was originally filed by George Ella Nelson of Chicago, Illinois, one of the defendants in error, in the Probate Court for the County of Suffolk and Commonwealth of Massachusetts, asking that a distribution of the estate of Mabel E. Allen, called Mabel Allen, formerly a resident of Boston in said County, an absentee, in the hands of said George R. Blinn, as receiver under an appointment by said Probate Court, after deducting charges and expenses of his receivership, be made pursuant to the provisions of Chapter 144 of the Revised Laws of said Commonwealth, and especially Sections 10, 11 and 12, and all acts in amendment thereof and in addition thereto. (Record, p. 12.) Robert J. Fisher, Emma E. Thomas, Blanche M. Umbach and John T. Sher-

bourne, the remaining defendants in error, appeared by counsel, filed their answer and joined in the prayer of the petition. (Record, p. 16). After hearing, the said Probate Court entered a decree as prayed for (Record, p. 18), from which decree the said George R. Blinn as receiver appealed to the Supreme Judicial Court for said County sitting as a court of probate appeal. (Record, p. 19.) Revised Laws, Chapter 162, Sections 8 and 9.

Thereupon a single justice of said court reported the case for the determination of the full court for the Commonwealth. (Record, p. 20.) Revised Laws, Chapter 173, Section 105. That said Supreme Judicial Court ordered that the entry be made of "decree affirmed" and the final decree was so entered. (Record, p. 22.)

The savings bank in which the fund in question is deposited notified the receiver that it would not allow the withdrawal of said fund until the question of the constitutionality of said statute had been passed upon by this court (Record, p. 11); and notice to the same effect was given to the receiver by the surety company acting as surety on his bond. The said Blinn as receiver as aforesaid thereupon duly filed his petition for a writ of error, which was duly allowed, and the case comes to this court on the assignments of error filed therewith. (Record, p. 26 *et seq.*)

The fund now in the hands of the receiver with the exception of accumulated interest was the share of the said Mabel E. Allen as a distributee under the will of Jonathan Merry, of Boston, merchant, who died in the year 1828 leaving claims against the United States Government known as the "French spoliation claims". His estate was duly administered and closed, reopened on September 21, 1885, and the sum of $27,236.46 collected, which was distributed among the respective heirs of the residuary legatees of the said Merry. One of the said residuary legatees was Elizabeth Chapman, long since deceased, and the said Mabel E. Allen was her grand-

daughter and as such entitled to $1655.00 from said sum; that at the time of the distribution thereof parties interested were unable to find the said Allen and her share was deposited in the Suffolk Savings Bank for Seamen and Others in the name of the Judge of Probate to accumulate for the benefit of the persons entitled thereto under orders of said Probate Court, one it 1899 and one in 1902. (Record, p. 16.)

Said Mabel E. Allen was born at New York in May, 1865, the only child of Emma Sherburne Allen and Joseph C. Allen, and resided with her mother at South Boston, Massachusetts, during her early years and her mother died when she was five years old. Thereafter she resided with a friend at South Boston and became a housekeeper and trained nurse and was employed there prior to 1891; that she was last seen at said Chicago on or about February 21, 1892, when she called upon the petitioner; was then unmarried and ill with consumption; that one Carlisle, whose last known address was 3 Fair Street, New Haven, Connecticut (1891), was her friend, but whose address and whereabouts are and have been for a long time unknown; that since 1899 to the date of the decree for distribution the petitioner, the receiver and other persons interested made many efforts to find the said Allen or learn something of her disappearance, but they found no trace of her whatever after February, 1892, as aforesaid; that the date of the disappearance as found and recorded by the court was "within or prior to the year 1892"; that her father was a veteran of the Civil War and for a time was an inmate of the Fitch Home for Soldiers and Soldiers' Hospital of Connecticut, which he left in December, 1891, and went to New York State, where he died on or about January 8, 1892, leaving no father or mother and never having had brothers or sisters; that her mother had one brother and one sister. The brother, Thomas Paine Sherburne, died April 6, 1876, leaving as his children the defendants in error, John T. Sherburne, Emma E. Thomas and Blanche M. Umbach. The sister, Elizabeth Sherburne

Davis Fisher, died May 9, 1900, leaving as her children the petitioner and the defendant in error, Robert J. Fisher. (Record, p. 17.)

THE STATUTE IN QUESTION.

At the time the plaintiff in error was appointed receiver as aforesaid, to wit, on July 20, 1905, the statute authorizing such appointment, and governing the management and distribution of the fund in question, being said Chapter 144 of the Revised Laws of said Commonwealth, as amended by Sections 14 to 20, inclusive, of Chapter 544 of the Acts of 1902, and by Chapter 241 of the Acts of 1903, and by Chapter 206 of the Acts of 1904, was as follows: —

> "Section 1. If a person entitled to or having an interest in property within the jurisdiction of the Commonwealth has disappeared or absconded therefrom, or has disappeared or absconded from the place without the Commonwealth where he was last known to be, and has no agent in the Commonwealth, and it is not known where he is, or if such person, having a wife or minor child dependent to any extent upon him for support, has thus disappeared or absconded without making sufficient provision for such support, and it is not known where he is, or if it is known that he is without the Commonwealth, any one who would under the law of this Commonwealth be entitled to administer upon the estate of such absentee if he were deceased, or if no one is known to be so entitled, any suitable person, or such wife, or some one in her or such minor's behalf, may file a petition under oath in the probate court for the county in which any such property is situated or found, stating the name, age, occupation and last known residence or address of such absentee, the date and circumstances of the disappearance or absconding, and the names and residence of other persons, whether members of such absentee's

family or otherwise, of whom inquiry may be made, and containing a schedule of the property, real and personal, so far as it is known, and its location within the Commonwealth, and praying that such property may be taken possession of and a receiver thereof appointed under the provisions of this chapter.

"Section 2. The court may thereupon issue a warrant directed to the sheriff or his deputy, which may run into and be served in any county, commanding him to take possession of the property named in said schedule and hold the same subject to the order of the court and make return of said warrant as soon as may be with his doings thereon with a schedule of the property taken possession of by virtue thereof. The officer shall post a copy of the warrant upon each parcel of land named in the schedule and cause so much of the warrant as relates to land to be recorded in the registry of deeds for the county and district in which the land is located. He shall receive such fees for serving the warrant as the court allows but not more than those established by law for similar service upon a writ of attachment. If the petition is dismissed, said fees and the cost of publishing and serving the notice hereinafter provided shall be paid by the petitioner. If a receiver is appointed said fees and cost shall be paid by the receiver and allowed in his account.

"Section 3. Upon the return of such warrant, the court may issue a notice which shall recite the substance of the petition, warrant and officer's return and shall be addressed to such absentee and to all persons who claim an interest in said property, and to all whom it may concern, citing them to appear at a time and place named and show cause why a receiver of the property named in the officer's schedule should not be appointed and said

property held and disposed of under the provisions of this chapter.

"Section 4. The return day of said notice shall be not less than thirty nor more than sixty days after its date. The court shall order said notice to be published in one or more newspapers within the Commonwealth, once in each of three successive weeks and to be posted in two or more conspicuous places in the city or town in which the absentee last resided or was known to have been either temporarily or permanently and upon each parcel of land named in the officer's schedule, and a copy to be mailed to the last known address of such absentee. The court may order other and further notice to be given within or without the Commonwealth.

"Section 5. The absentee and any person who claims an interest in any of the property may appear and show cause why the prayer of the petition should not be granted. The court may after hearing dismiss the petition and order the property in possession of the officer to be returned to the person entitled thereto, or it may appoint a receiver of the property which is in the possession of the officer and named in his schedule. If a receiver is appointed the court shall find and record the date of the disappearance or absconding of the absentee; and such receiver shall give bond to the judge of probate and his successors in office in such sum and with such condition as the court orders, with a company named in section sixty-one of chapter one hundred and eighteen and approved by the court as surety thereon.

"Section 6. After the filing and approval of such bond the court may order the sheriff or his deputy to transfer and deliver to such receiver the possession of the property under the aforesaid warrant, and the receiver shall file in the registry of probate a schedule of the property received by him.

"Section 7. Such receiver upon petition filed by him may be authorized and directed to take possession of any additional property within the Commonwealth which belongs to such absentee and to demand and collect all debts due such absentee from any person within the Commonwealth, and hold the same as if it had been transferred and delivered to him by the officer.

"Section 8. The court may make orders for the care, custody, leasing and investing of said property and its proceeds. If any of said property consists of live animals or is perishable or cannot be kept without great or disproportionate expense, the court may, at any time after the return of the warrant, order such property to be sold at public or private sale. After the appointment of a receiver, upon his petition and after notice, the court may order all or part of said property, including the rights of the absentee in land, to be sold at public or private sale to supply money for payments authorized by this chapter or for reinvestment approved by the court.

"Section 9. The court may order said property or its proceeds acquired by mortgage, lease or sale to be applied in payment of charges incurred or that may be incurred in the support and maintenance of the absentee's wife and minor children, and to the discharge of such debts as may be proved against said absentee.

"Section 10. The receiver shall be allowed such compensation and such disbursements as the court orders to be paid out of said property or its proceeds. If such absentee appears within fourteen years after the date of the disappearance and absconding as found and recorded by the court, the receiver shall account to him for, deliver and pay over the unexpended balance of said property. If, within said fourteen years, an administrator, executor, assignee in insolvency or trustee in bankruptcy of said absentee is appointed, such receiver shall account for,

deliver and pay over to him the unexpended balance of said property. If said absentee does not appear and claim said property within said fourteen years, all the right, title and interest of said absentee in said property, real or personal, or the proceeds thereof, shall be barred and no action, suit or petition in any form shall be commenced by said absentee after the expiration of said fourteen years for or on account of said property or its proceeds.

"Section 11. If, at the expiration of said fourteen years, said property has not been accounted for, delivered or paid over under the provisions of the preceding section, the court shall order the distribution of the unexpended balance thereof to the persons to whom, and in the shares and proportions in which, it would have been distributed if said absentee had died intestate within the Commonwealth on the day fourteen years after the date of the disappearance or absconding as found and recorded by the court.

"Section 12. If such receiver is not appointed within thirteen years after the date found by the court under the provisions of section five, the time limited for accounting for, or fixed for distributing, said property or its proceeds, or for barring actions relative thereto, shall be one year after the date of the appointment of the receiver instead of the fourteen years provided in the two proceding sections."

The statute, as above set forth, was in full force at the time of the decree for distribution in question, to wit, on June 24, 1907, with the following exceptions:

Section 1 had been amended by Chapter 224 of the Acts of 1906 by adding to the end thereof the following:

"If such absentee has left no corporeal property within this Commonwealth, but there are debts and obligations

due or owing to such absentee from persons within the Commonwealth, a petition may be filed under oath as provided in this chapter, stating the nature and amount of such debts and obligations, so far as they are known, and praying that a receiver thereof may be appointed. The court may thereupon issue a notice as provided in this chapter, without issuing a warrant as herein provided, and may, upon the return of said notice and after a hearing, dismiss the petition or appoint a receiver and authorize and direct him to demand and collect the debts and obligations specified in said petition. If a receiver is appointed he shall give bond as provided in this chapter, and he shall hold the proceeds of such debts and obligations and all property received by him, and he shall distribute the same as provided in this chapter. The receiver may be further authorized and directed as provided in section seven of this chapter."

And Section 9 has been amended by Chapter 175 of the Acts of 1906, by inserting in the fifth line, after the word "debts", the words "and claims for alimony".

Specification of Alleged Errors.

The assignments of error (Record, pp. 27–28) raise the question whether on the facts as set out in the pleadings this statute is repugnant to the fifth or fourteenth amendments to the Constitution of the United States in that said statute deprives the plaintiff in error and the said Mabel E. Allen, represented by him, of the rights, privileges and immunities secured to them as citizens of the United States of America, and that it deprives and denies them the equal protection of the law, and deprives them of the property in question without compensation and without due process of law. Also that the said statute is unreasonable and void in that it makes no provision for recovery of the property in question should the absentee ever return, that the notice required is not reasonable and that

said absentee has not been absent a sufficient time to warrant final distribution of her property. (See objections to decree, Record, pp. 19–20.)

This statute may be divided into two separate parts and each part considered separately:

I. Are the above statutes providing for the appointment of a receiver for the care and management of property within the Commonwealth of an absentee, the payment of debts, etc., in violation of the above amendments?

II. Are the above statutes providing for the ultimate disposition of such property of an absentee in violation of the above amendments?

ARGUMENT.

I.

The plaintiff in error does not seriously contend that the above described statute is not constitutional and valid in so far as it provides for the appointment of a receiver for the care and management of property within the Commonwealth of a person who has absented himself therefrom and for the payment of his debts. This point seems to be well settled by the case of *Cunnius* v. *Reading School District*, 198 U. S. 458, and he does not claim that there is any constitutional limitation peculiar to said Commonwealth which affects this case, and he will not attempt, therefore, to cover the ground which led up to that decision and which he assumes governs this case in so far as the facts and circumstances are analogous. See also

George v. *Clark*, 186 Mass. 426.
Purdan v. *Blinn, Receiver*, 192 Mass. 387.
Nelson v. *Blinn, Receiver*, 197 Mass. 279.

II.

The receiver contends, however, that those parts of said statute which provide that such absentee shall forever be barred from recovering said property after the expiration of

fourteen years from the date of disappearance and for the ultimate disposition of such property are unconstitutional and void in that —

(*a*) The notice which is required as the prerequisite to the proceedings is inadequate.

(*b*) The safeguards affecting the rights of the absentee in the distribution of the property are inadequate.

(*c*) The time within which distribution may be made is arbitrary and unreasonable.

In this connection it is instructive to consider the difference between the statute of the Commonwealth of Massachusetts, which is the subject of construction in this case, and the statute of the State of Pennsylvania (Public Laws 1885, p. 155), which was favorably passed upon in the case of *Cunnius* v. *Reading School District* above referred to. The latter statute is as follows:

> "Sec. 1. Whenever, hereafter, letters of administration on the estate of any person supposed to be dead on account of absence for seven or more years from the place of his last domicil within this commonwealth, shall be applied for, it shall be the duty of the register of wills to whom the application shall be made, to certify the same forthwith to the orphans' court of the county; the said court, if satisfied that the applicant would be entitled thereto, were the supposed decedent in fact dead, shall cause to be advertised, in a newspaper published in the county, once a week for four successive weeks, the fact of said application, together with notice that on a day certain, which shall be at least two weeks after the last of said advertisements, the court will hear evidence concerning the alleged absence of the supposed decedent and the circumstances and duration thereof.
>
> "2. At the hearing, the orphans' court shall take such legal evidence as shall then be offered, for the purpose

of ascertaining whether the presumption of death is established, and no person shall be disqualified to testify by reason of his or her relationship as husband or wife to the supposed decedent, or of his or her interest in the estate of the person supposed to be dead.

"3. If satisfied, upon the hearing, that the legal presumption of death is made out, the court shall so decree, and shall forthwith cause notice thereof to be inserted for two successive weeks in a newspaper published in the county, and also, when practicable, in a newspaper published at or near the place beyond the commonwealth, where, when last heard from, the supposed decedent had his residence. The said notice shall require the supposed decedent, if alive, or any other person for him, to produce to the court within twelve weeks from the date of its last insertion satisfactory evidence of his continuance in life.

"4. If, within the said period of twelve weeks, evidence satisfactory to the orphans' court of the continuance in life of the said decedent shall not be forthcoming, it shall be the duty of the court to order the register of wills to issue the letters of administration to (the) party thereto entitled; and the said letters, until revoked, and all acts done in pursuance thereof and in reliance thereupon, shall be as valid as if the supposed decedent were really dead.

"5. The orphans' court may revoke the said letters at any time, on due and satisfactory proof that the supposed decedent is in fact alive; after which revocation all the powers of the administrator shall cease, but all receipts or disbursements of assets, and other acts previously done by him shall remain as valid as if the said letters were unrevoked; and the administrator shall settle an account of his administration down to the time of such revocation, and shall transfer all assets remaining

in his hands to the person as whose administrator he had acted, or to his duly authorized agent or attorney: Provided, nothing in this act contained shall validate the title of any person to any money or property received as widow, next of kin or heir of such supposed decedent, but the same may be recovered from such person in all cases in which such recovery would be had, if this act had not been passed.

"Before any distribution of the proceeds of the estate of such supposed decedent, the persons entitled to receive the same shall respectively give sufficient, real, personal security, to be approved of by the orphans' court having jurisdiction, in such sum and form as the court shall direct, with condition, that if the said supposed decedent shall in fact be at the time alive, they will respectively refund the amounts received by each on demand, with interest thereon; but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest, on security approved by said court, which interest is to be paid annually to the person entitled to it, and the money to remain at interest until the security aforesaid is given, or the orphans' court, on application, shall order it to be paid to the person or persons entitled to it.

"6. After revocation of the letters, the person erroneously supposed to be dead may, on suggestion filed of record of the proper fact, be substituted as plaintiff in all actions brought by the administrator, whether prosecuted to judgment or otherwise. He may, in all actions previously brought against his administrator, be substituted as a defendant, on proper suggestion filed by himself, or by the plaintiff therein, but shall not be compelled to go to trial in less than three months from the time of such suggestion filed. Judgments recovered against the administrator before revocation, as aforesaid, of the let-

ters, may be opened on application by the supposed decedent, made within three months from the said revocation and supported by affidavit, denying specifically, on the knowledge of the affiant, the cause of action, or specifically alleging the existence of facts which would be a valid defence; but, if within the said three months, such application shall not be made, or being made, the facts exhibited shall be adjudged an insufficient defence, the judgments shall be conclusive to all intents saving the defendant's right to have it reviewed, as in other cases by *certiorari* or writ of error. After the substitution of the supposed decedent as defendant in any judgment, as aforesaid, it shall become a lien upon his real estate in the county, and shall so continue for the period of five years, as other judgments, unless and until it shall be set aside by the court below, or reversed in the supreme court.

"7. The costs attending the issue of letters or their revocation, shall be paid out of the estate of the supposed decedent; and costs arising upon an application for letters which shall not be granted, shall be paid by the applicant."

III.

Is the notice required by the Massachusetts statute insufficient?

The provisions as to the notice read as follows:

Under Section 2 a warrant is issued to a sheriff, who seizes property and posts a copy of his warrant on the land and records notice of his proceeding in the Registry of Deeds.

Then —

"Section 3. Upon the return of such warrant the court may issue a notice which shall recite the substance of the petition, warrant and officer's return, and shall be addressed to such absentee and to all persons who claim

an interest in said property and to all whom it may concern . . . "

Citing them to appear, etc.

Also:

"Section 4. The return day of said notice shall be not less than thirty nor more than sixty days after its date. The court shall cause said notice to be published in one or more newspapers within the Commonwealth, once in each of three successive weeks, and to be posted in two or more conspicuous places in the city or town in which the absentee last resided or was known to have been either temporarily or permanently and upon each parcel of land named in the officer's schedule, and a copy to be mailed to the last known address of such absentee. The court may order other and further notice to be given within or without the Commonwealth."

The corresponding provisions of the said Pennsylvania statute are as follows: under Section 1 upon application to the orphans' court, that court shall cause to be advertised, in a newspaper published in the county, once a week for four successive weeks, the fact of said application, together with notice that on a day certain, which shall be at least two weeks after the last of said advertisements, the court will hear evidence concerning the alleged absence of the supposed decedent and the circumstances and duration thereof.

If satisfied, upon the hearing, that the legal presumption of death is made out, the court shall so decree, and shall forthwith cause notice thereof to be inserted for two successive weeks in a newpaper published in the county, and also, when practicable, in a newspaper published at or near the place beyond the Commonwealth where, when last heard from, the supposed decedent had his residence. The said notice shall require the supposed decedent, if alive, or any other person

for him, to produce to the court within twelve weeks from the date of its last insertion satisfactory evidence of his continuance in life.

It will be seen that under the Massachusetts statute a minimum constructive notice of thirty days is all that is required, whereas under the Pennsylvania statute the minimum time which must elapse between the filing of the original petition and the issuing of letters of administration thereunder is twenty weeks, nearly five times as long as the requirement of the former statute.

It might well be argued that a constructive notice of thirty days is all that is necessary for the taking possession of and preservation of the property of an absentee, including the payment of his legal obligations, but the plaintiff in error contends that such notice is grossly inadequate as the foundation for proceedings which must result, as soon as the period of absence reaches fourteen years, in authorizing the transfer of the property of the absentee to others. The difference in the length of notice required by the two statutes in question is the more startling when we consider how much more serious upon the absentee is the effect of the Massachusetts statute than that of the Pennsylvania statute.

IV.

Are the rights of the absentee properly safeguarded in case of a distribution?

The sections under which distribution is made under the Massachusetts statute are as follows:

> "Section 10. The Receiver shall be allowed such compensation and such disbursements as the Court orders to be paid out of said property or its proceeds. If such absentee appears within fourteen years after the date of the disappearance and absconding as found and recorded by the Court, the Receiver shall account to him for, deliver and pay over the unexpended balance of said

property. If, within said fourteen years, an administrator, executor, assignee in insolvency, or trustee in bankruptcy of said absentee is appointed, such Receiver shall account for, deliver and pay over to him the unexpended balance of said property. If said absentee does not appear and claim said property within said fourteen years, all the right, title and interest of said absentee in said property, real or personal, or the proceeds thereof shall be barred, and no action, suit or petition in any form shall be commenced by said absentee after the expiration of said fourteen years for or on account of said property or its proceeds.

"Section 11. If at the expiration of said fourteen years, said property has not been accounted for, delivered or paid over under the provisions of the preceding section, the Court shall order the distribution of the unexpended balance thereof to the persons to whom, and in the shares and proportions in which, it would have been distributed if said absentee had died intestate within this Commonwealth on the day fourteen years after the date of the disappearance or absconding as found and recorded by the Court.

"Section 12. If such Receiver is not appointed within thirteen years after the date found by the Court under the provisions of section five, the time limited for accounting for, or fixed for distributing, said property or its proceeds, or for barring actions relative thereto, shall be one year after the date of the appointment of the Receiver instead of the fourteen years provided in the two preceding sections."

It will be seen that the rights of the absentee are absolutely barred at the expiration of fourteen years from the date of disappearance or at the expiration of one year after the appointment of a receiver in the event that such appointment is

made more than thirteen years after the date of disappearance. In other words, if the absentee in this case, Mabel Allen, had returned to the Commonwealth of Massachusetts the next day after the expiration of that period, she would be unable to gain possession of her property and the court would be powerless to help her although proceedings for distribution had not then been commenced and the property was still in the hands of the receiver. On the other hand, the Pennsylvania statute leaves a discretion with the court which may most carefully protect the rights of the absentee however long his absence may continue even after provision is made for the giving of security by those found to be entitled to the absentee's property, and in the event that such security is not given that the distribution of the property may be indefinitely delayed, the entire statute is framed upon the theory that whenever the absentee does return he shall be entitled to his property whether it has been distributed or is still in the hands of the administrator.

The Massachusetts statute, on the other hand, can only be defended as a statute of limitations, and if the time within which the statute is to take effect is unreasonably short, it is unconstitutional. The consideration of what constitutes a reasonable or unreasonable length of time for such a statute to operate depends upon the circumstances of the class of cases which it affects. The time which is reasonable for one class of cases may be unreasonable for another class of cases and all classes of cases may be affected in times of a public emergency.

American Land Co. v. *Zeiss*, 219 U. S. 47.

See the language of this Court in *Wilson* v. *Iseminger*, 185 U. S. 55, as follows:

> "It may be properly conceded that all statutes of limitations must proceed on the idea that the party has full opportunity afforded him to try his rights in court.

A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily whatever might be the purport of its provisions."

Sturgis v. *Crowningshield*, 4 Wheaton, 122 at 207.
In re Brown, 135 U. S. 701 at 707.

The question of the distribution of the property of an absentee does not involve any public emergency, it simply has to do with the orderly care and disposal of abandoned property, or the property for which no owner can be found. There are no considerations which require undue haste in its distribution. There is, on the other hand, every consideration for insisting upon the rights of the absentee to be adequately protected. The plaintiff in error contends that where the statute is of such a nature as absolutely to deprive the absentee of his property by lapse of time and leaving him entirely without remedy, the length of time to elapse should not be less than the length of time fixed in the Commonwealth of Massachusetts for the loss of real estate by abandonment, to wit, twenty years.

V.

Is the time within which distribution may be made arbitrary and unreasonable?

In discussing the question of the length of time required by the Massachusetts statute before distribution can be made, we speak of fourteen years. This, however, is not true. Fourteen years must elapse after the disappearance of the absentee before distribution can be made, but it does not follow that property may have been abandoned for that length of time. The theory upon which statutes of this kind are based is that it is within the power of the State to preserve and ultimately to distribute abandoned property or property of which the owner cannot be found and we are accustomed

to refer to the owner as an absentee. The statute in question characterizes the date such person was last seen as the date of the disappearance and absconding, and it must be borne in mind, however, that this statute applies to an entirely different class of cases from those arising from the disappearance or absconding of an individual leaving abandoned property behind him. The statute applies with equal force to all persons who at any time have lived in Massachusetts and subsequently have changed their residence to another State without leaving their new address. In most cases there is nothing reprehensible in such conduct. It is not of a kind to be severely dealt with by the court. It is what almost always happens when a person breaks up his home in one State and removes to another State without leaving behind him near relatives or close friends. Thousands of persons have left the State under these circumstances who have become honored and respected citizens in their new homes. If a man, after having left the State for at least thirteen years, becomes entitled to property within the State by inheritance or otherwise, it is open to the court under the fifth section of the Massachusetts statute, in case his whereabouts have remained unknown during that period, to fix the date of his having left this State as the date of his disappearance or absconding, and thereupon a receiver may be appointed, and upon the expiration of one year from the date of such appointment, the right of this person to his inheritance is absolutely barred by the twelfth section, and he is without remedy. If he returns to the State the next day after the expiration of that year, the courts would be powerless to help him, and all this might well happen before the property itself was ready for distribution by the executor or administrator of the decedent.

It is true that the ingenuity of counsel can show hardship and apparent injustice arising from all statutes of limitations. Exceptional cases can be conjectured in opposition to such statutes, but the question to be decided is not how the statute

will work in such exceptional and unusual cases, but what will be its natural tendency. The plaintiff in error contends that the Massachusetts statute works hardship and injustice, not in exceptional cases, but in whole classes of cases, because it applies not only to those who have disappeared and absconded leaving property behind them which should be preserved and leaving domestic and financial obligations behind them which should be fulfilled, but also applies to the large class of cases of those who have changed their residence without leaving their new addresses, and because the measure of time for the running of the statute is based, not upon the length of time property has been abandoned, which should be the determining factor, but upon the length of time which has elapsed after the date of the disappearance. The time within which a person may lose his property under this statute is consequently not fourteen years, but, under certain circumstances liable to arise, is only thirty days more than one year. It is hard to believe that a statute could be held constitutional which stated in so many words that if a person once having lived in Massachusetts has left and his whereabouts have been unknown for thirteen years, that his right to any inheritance thereafter shall be limited to one year and thirty days, after which time his right thereto shall be barred, and no action, suit or petition in any form shall be commenced by him for or on account of such property or its proceeds.

Stress has been laid upon the unreasonableness of the twelfth section of the said statute, but great injustice also may be found in the working of the tenth and eleventh sections thereof; under these sections, if a receiver has previously been appointed, it is possible for an absentee to lose his inheritance almost as soon as his right thereto accrues and long before it could be delivered to him in the ordinary course of probate proceedings. This injustice, again, is due to the length of disappearance being taken as the measure of

time, rather than the length of the abandonment of the property to be affected by the statute.

The plaintiff in error contends that that portion of the statute in question which provides for the distribution of the property of an absentee is unconstitutional and void, because it operates as a statute of limitations, the time of which is unreasonably short and is measured by the wrong standard, to wit: the duration of the absence instead of the duration of the abandonment of the property to be distributed.

VI.

Although the last part of the statute providing for final distribution of the property is void, yet that part of the statute which provides for the appointment of the receiver and the care and management of the property, payment of the debts and obligations of the absentee, etc., is valid, to wit: the first nine sections and the first sentence of the tenth section. These two parts are entirely distinct and separable, and that providing for such care and management is in no way dependent upon that part providing for final distribution and might well have been enacted alone without any provision for distribution.

Commonwealth v. *Hitchings*, 5 Gray, 482 at 485.
Commonwealth v. *Petranich*, 183 Mass. 217 at 220.
Edwards v. *Bruorton*, 184 Mass. 529 at 530.
Commonwealth v. *Anselvich*, 186 Mass. 376 at 379.
Commonwealth v. *Cadwell*, 190 Mass. 355 at 358.
Cooley's Constitutional Limitations (7th ed.), p. 246, etc.

In fact, the statute as first enacted in 1894 did not provide for any final distribution. The tenth and eleventh sections were added in 1897 and the twelfth section in 1902.

Respectfully submitted,

GEORGE R. BLINN,
Receiver, pro se.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 116.

GEORGE R. BLINN, Receiver of the Property of Mabel Allen, otherwise Known as Mabel E. Allen, an Absentee, Plaintiff in Error,

v.

GEORGE ELLA NELSON ET AL.

BRIEF FOR GEORGE ELLA NELSON, ROBERT J. FISHER, EMMA E. THOMAS, BLANCHE M. UMBACH AND JOHN T. SHERBURNE.

STATEMENT OF THE CASE.

Mabel E. Allen, called Mabel Allen, formerly of Boston, Mass., was last heard from while visiting her cousin, George Ella Nelson, at Chicago, on or about February 21, 1892, then unmarried and ill with consumption. Many efforts have been made to find her, but to no purpose. Next of kin are her cousins, the defendants in error. The said Allen became entitled to the fund in question as heir at law of her grandmother, who was one of the residuary legatees named in the will of Jonathan Merry, late of said Boston, who died in 1828, but distribution of this fund was not made until 1899 and 1901, when the shares of the said Allen were deposited in a savings bank pursuant to Revised Laws of Massachusetts, Chapter 150, Section 23. The plaintiff in error was appointed receiver of the property of said Allen by said Probate Court

on June 20, 1905, and gave bond as such, pursuant to Chapter 144 of said Revised Laws and acts in amendment thereof and in addition thereto. Said Court thereupon ordered the savings bank to transfer the fund to said receiver, who now holds the same. After fourteen years had passed since the disappearance of the said Allen, George Ella Nelson, one of the defendants in error, applied to said court for a distribution of the fund among the persons who would be the heirs at law of the said Allen had she died within the Commonwealth on the day fourteen years after the date of her disappearance and after notice, the appearance and answers of the other four defendants in error, being the remaining persons who would be such heirs at law, and hearing, the said Court ordered the fund distributed, on June 24, 1907. The receiver appealed from this decree, whereupon the case was transferred to the Supreme Judicial Court for said county and was then reported by a single justice of said court to the full court for the Commonwealth, where a rescript was returned of "decree affirmed" and final decree entered thereon on November 19, 1908. The case comes to this Court on a writ of error upon the petition of said receiver, who claims that said Chapter 144 and acts in amendment thereof and in addition thereto are repugnant to the fifth or fourteenth amendments to the Constitution of the United States of America. (See specification of objections on appeal, Record, pp. 19 and 20, and items of error, Record, pp. 27 and 28.)

That part of Chapter 144 which the receiver especially attacks are the provisions of Sections 10, 11 and 12, which in substance provide that if the said absentee does not appear and claim said property within fourteen years after the date of the disappearance, such absentee shall be forever barred and that no action, suit or petition after said date shall be brought to recover the same and that the Probate Court shall order the distribution of the unexpended balance of the fund to the persons to whom and in the shares and proportions in

which it would have been distributed had said absentee died intestate within the Commonwealth on the day fourteen years after the date of disappearance. Likewise the provision that if said receiver is not appointed within thirteen years after the date of said disappearance the said absentee shall not be barred, and no distribution shall be made until after the expiration of one full year after the date of the appointment of such receiver.

ARGUMENT.

I.

As to Care of the Property.

The first nine sections of the Statute and the first part of the tenth section are constitutional and valid beyond question, and the defendants in error do not understand that the receiver seriously questions this. The case of *Cunnius* v. *Reading School District*, 198 U. S. 458, affirming 206 Pa. St. 469, definitely establishes the proposition that the several States have the right to make reasonable regulations for the care and management of the property of an absentee within the State as well as to the payment of his debts. The authority under a Statute passed for that purpose like the one in issue is very different from the authority under a Statute providing for the administration of the estates of deceased persons, as it has been repeatedly held that in these cases the jurisdiction of the court is wanting unless the person be actually dead. This limitation was early recognized by Massachusetts courts.

Jochumsen v. *Suffolk Sav. Bank*, 3 Allen, 87.
Day v. *Floyd*, 130 Mass. 488.

It was because of these decisions that this Statute was enacted. See also *Cunnius* v. *Reading School District, supra*, where the ground is fully covered and cases collected up to that time. Consequently, the only question open here is

whether the regulations made under the Statute in question are reasonable.

In this connection it is desirable to consider the facts of said case of *Cunnius* v. *Reading School District* and compare them with the case at bar.

That was a case arising under a Statute of the State of Pennsylvania (see Appendix), providing that application might be made for administration upon the estate of a person who was supposed to be dead on account of his absence for seven years or more from his last known domicile. Upon the application, notice issues returnable on a day contain which must be published in a paper in the county for four successive weeks, last publication being two weeks before the return day. At the hearing if the presumption of death is made out, notice is then published for two successive weeks in a paper in said county, and also when possible in a paper at or near the place of the last residence of the absentee, which notice shall require the absentee or any person for him to produce in court within twelve weeks from the date of the last insertion of the notice satisfactory evidence that the absentee is not dead, and if so no such evidence is produced letters of administration will issue and all acts thereunder shall be as valid as if he were dead, but the court may revoke the letters at any time upon proof that he is living, and all accounts shall be settled up to the time of revocation and the property turned over to the absentee.

Under the Massachusetts Statute the petition may be filed at any time during the absence of the party if there is occasion for a receiver. A warrant then issues to a sheriff to take possession of and hold the property in question, a copy of which warrant is posted on each parcel of land and recorded with the Registry of Deeds of the county in which the land lies. Upon the return of the warrant notice then issues to the absentee, to all who claim interest in the property and to all whom it may concern. The return day shall

not be less than 30 or more than 60 days, and the court shall order it published in one or more newspapers within the Commonwealth once each week for three successive weeks, and to be posted at two or more conspicuous places in the place where the absentee last resided or was known to have been either temporarily or permanently, and upon each parcel of land, and a copy of the notice mailed to said absentee to the last known address; also the court may order any other and further notice. If a receiver is appointed he must give a bond as the court may order, with a surety company as surety thereon, and then he takes possession of the property, files a schedule thereof, collects all sums due and, under the direction of the court, has the care, custody, leasing, investing and sale of the property, together with its application for the support and maintenance of the wife and minor children of the absentee, the payments of his debts and claims for alimony; likewise the court may allow the receiver compensation and his disbursements. If the absentee appears within fourteen years after the date of disappearance as found and recorded by the court, the receiver shall account to him and pay over any balance of the property in his hands, or he shall pay the same over to any administrator, executor, assignee in insolvency or trustee in bankruptcy of the said absentee that may be appointed within said period.

It should be noted here that all the provisions of the Statute with reference to the appointment of the receiver and the care and management of the property have been strictly complied with, and that 42 days' notice was given upon the original petition. There was no real estate in this case. (See Record, pp. 5, 6.)

The defendants in error submit that all the above provisions come well within the rule laid down by this Court in *Cunnius* v. *Reading School District*, and are a reasonable exercise of the police power of the State. Every safeguard has been thrown about the property up to this point, and it is under

the wise direction and control of the Court with all the safeguards that exist in the case of any receivership proceedings.

Nelson v. *Blinn*, 197 Mass. 279.

Attorney General v. *Provident Inst. for Savings, etc.*, 201 Mass. 23.

II.

As to the Final Distribution.

Those parts of the Statute providing for final distribution of the property after the expiration of 14 years are not repugnant to the fifth or fourteenth amendments.

This question is likewise settled by the case of *Cunnius* v. *Reading School District, supra.* The Pennsylvania Statute provides that after the appointment of the administrator the property may be distributed at once but security taken for its repayment by the distributees should the absentee return, and if they are unable to give such, the money shall be put at interest and the income paid to them until security is furnished or until the "court on application shall order it to be paid to the person or persons entitled to it"; consequently the entire fund may be distributed without any security for its repayment and without any chance for its recovery, by an order of the Court, that the heirs-at-law of the absentee are the "persons entitled to it" within a very short time after the expiration of 7 years.

Under the Massachusetts Statute, after 14 years the absentee is barred and the property may be distributed, upon application, to the persons and in the proportions that it would have been had the absentee died intestate within the State on the day 14 years after the date of disappearance as found and recorded by the Court. In the case at bar careful notice was issued on the petition for distribution which was required to be published in a Boston and a Chicago paper for three successive weeks each, and then on the return

day it was ordered that the same notice be given again. (Record, pp. 13, 14, 15.)

The only material difference between the Pennsylvania Statute and the Massachusetts Statute is that the former seems to leave the matter of final distribution to the discretion of the Court and provides for security for its repayment unless the Court decrees its ultimate distribution to the persons entitled thereto, while the latter Statute provides that the property shall never be repaid after the expiration of 14 years and creates a new statute of limitations.

Nelson v. *Blinn*, 197 Mass. 279.

III.

As a Statute of Limitations.

It is within the power of a State to enact reasonable statutes of limitations and establish a time after which no action can be brought. This power is legislative and not judicial.

American Land Co. v. *Zeiss*, 219 U. S. 47 at 70.
Kentucky Union Co. v. *Kentucky*, 219 U. S. at 156.

Missouri v. *Illinois et al.*, 200 U. S. 496, Holmes, J., page 520, says: "It would be contradicting a fundamental principle of human nature to allow no effect to the lapse of time however long — yet the fixing of a definite time usually belongs to the Legislature rather than the courts. The courts did fix a time in the rule against perpetuities, but the usual course, as in the instance of statutes of limitations, the duration of patents, the age of majority, etc., is to depend upon the law-making power."

Davis v. *Mills*, 194 U. S. 451, where a new law provided that the statute of limitation should run in favor of non-residents which had not been the law up to that time. The action accrued September 22, 1893, the new law went into effect July 1, 1896, and the claimant had until September 22, 1896, to bring the suit. This Court held (Holmes, J., p.

456) that the Statute did not shorten the liability unreasonably. "Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight. But that demand is not founded more certainly by creation or discovery than it is by the lapse of time. . . ."

Soper v. *Lawrence Bros. Co.*, 201 U. S. 359, affirming 98 Maine, 268. Holmes, J., said: "It was not, and could not, be argued that a statute of limitation allowing nearly five years would be unreasonably short."

Tioga R. R. v. *Blossburg & Corning R. R.*, 20 Wallace, 137, at 150. "Statutes of limitations are in their nature arbitrary. They rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens. Each determines such limits and imposes such restrictions as it thinks proper."

Metcalf v. *Watertown*, 153 U. S. 671.

McElmoyle v. *Cohen*, 13 Peters, 312 at 327. Five years allowed.

Wheeler v. *Jackson*, 137 U. S. 245. Six months allowed.

Turner v. *New York*, 168 U. S. 90, affirming 145 New York 451. Six months allowed. See also *Saranac Land & Timber Co.* v. *New York*, 177 U. S. 318.

Terry v. *Anderson*, 95 U. S. 628. Nine months and seven days allowed.

Jackson v. *Lamphire*, 3 Peters, 280. Two years allowed.

Sohn v. *Waterson*, 17 Wallace, 596. Two years allowed.

Hawkins v. *Barney*, 5 Peters, 456, where Kentucky's Seven Years' Possession Law was held valid.

Local conditions must govern.

Nelson v. *Blinn*, 197 Mass. 279.

Attorney General v. *Provident Inst. for Savings*, 201 Mass. 23.

The fact that there may be a distribution after one year

after the appointment of a receiver is not unreasonable, especially when taken in connection with the absence of the party for over fourteen years; nor is it unreasonable to provide that the time shall be reckoned from the date of the disappearance rather than from the date of the right of the absentee to possession of any property in question. That has always been the rule in case of presumption of death after seven years' absence and important rights are determined by it.

Loring v. *Steineman*, 1 Met. 204.
George v. *Clark*, 186 Mass. 426.
Butrick v. *Tilton*, 155 Mass. 461.
Marden v. *Boston*, 155 Mass. 359.
Stockbridge, Pet'r, 145 Mass. 517.
Bowditch v. *Jordan*, 131 Mass. 321.
Kelly v. *Drew*, 12 Allan, 107.
King v. *Fowler*, 11 Pick. 302.

It is possible to imagine a case that may seem to work hardship but that is equally true under any statute of limitations which may have run while the owner is ignorant of his rights. It is the penalty one pays for his absence without leaving his address, notifying his friends or appointing an agent. As was said in *Hurling* v. *Caw Valley Railway*, 130 U. S. 559: "It is, therefore, the duty of such to take measures to be represented."

It is suggested that an absentee might fall heir to property a few days before the time had run and that the receiver might obtain an order of court for possession of the same under Section 7 of the statute and so bring this new property within the operation of the statute in a very short time. Such a proceeding would be very unusual, and it is entirely within the discretion of the court to give or decline such an order or not to appoint a receiver at all, and it must be presumed that the court will administer the law reasonably.

Tyler v. *Judges, etc.*, 175 Mass. 78.

But this hardship might equally exist in the case of presumption of death after seven years absence. This provision cannot be said to be so far unreasonable as to be void when taken in conjunction with the absence of the party for fourteen years and the appointment of a receiver at least one year before.

See also *Cleaveland* v. *Draper*, 194 Mass. 118, where the Probate Court decreed distribution to the wrong person.

IV.

As a Proceeding in Rem.

The Massachusetts Statute creates a proceeding *in rem.* Under Section 2 the court through its officer seizes the property and holds it until the receiver is appointed to have actual possession of it. It is all the time in the possession and under control of the court.

Nelson v. *Blinn*, 197 Mass. 279.
Tyler v. *Judges, etc.*, 175 Mass. 71.

Heidritter v. *Elizabeth Oilcloth Co.*, 112 U. S. 294. "This jurisdiction attaches when property is seized and brought into court."

Hawkins v. *Barney, supra,* where the court said on page 466: "The right to appropriate a derelict is one of universal law well known to the civil law, the common law and to all law; it existed in a state of nature and is only modified by society according to the discretion of each community. What is the evidence of an individual having abandoned his rights or property? It is clear that the subject is one over which every community is at liberty to make a rule for itself."

Arndt v. *Griggs*, 134 U. S. 316.
Hamilton v. *Brown*, 161 U. S. 256,

where the Court said, page 275: "When a man dies, the Legislature is under no constitutional obligation to leave the title

to his property, real or personal, in abeyance for an indefinite period — but it may provide for promptly ascertaining by appropriate judicial proceedings who has succeeded to the estate." And again, on page 274: "As to personal property a judgment *in rem*, after notice by publication only, might not bind persons who had no notice of the proceedings unless the thing had been first seized into the custody of the Court."

Roller v. *Holly*, 176 U. S. 398.
Hurling v. *Kaw Valley Ry. etc., Co.*, 130 U. S. 559.
Pennoyer v. *Neff*, 95 U. S. 714.
Hilton v. *Guyot*, 159 U. S. 113 at 167.
Wisconsin v. *Pelican Ins. Co.*, 127 U. S. 265 at 291.
Cooper v. *Reynolds*, 10 Wallace, 308, 317–18.
Williams v. *Armroyd*, 7 Cranch, 423.

One of the principal reasons why the numerous statutes providing for administration upon estates of persons presumed to be dead were held to be void, was because the property was not seized and taken into the custody of the Court, so that the sole ground for the jurisdiction, *i.e.*, the death, was lacking.

Scott v. *McNeal*, 154 U. S. 34 at 47.

The late case of *American Land Co.* v. *Zeiss*, 219 U. S. 47 at 59, etc, clearly shows the power of the State in such cases.

V.

As to Notice.

The very essence of a proceeding *in rem* is that no actual notice need be given to the parties interested.

Pennoyer v. *Neff*, 95 U. S. 714.

Oregon statute provides that in suits against non-residents, where attachment of property is made in the State, service on defendant may be made by publication. The court held, page 727, that a substituted service by publication or in any

other authorized form, might be sufficient to inform the parties of the object of the proceedings taken when the property is once brought under the control of the court by a seizure or some equivalent act, and that the law will assume that property is always in the possession of its owner or agent, and the validity of the notice is based on the theory that the seizure of the property will inform the owner not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation or sale, and that such notice may also be sufficient in cases where the object of the action is to reach and dispose of the property in the State or some interest therein, by enforcing a contract or lien, or to partition it among different owners, etc. In other words, such service may answer in all actions which are substantially proceedings *in rem*.

Hurling v. *Kaw Valley Ry.*, *supra*, where the court said that if the non-resident failed to be represented within the State and fails to get the notice required by the ordinary publication in the papers, he must abide the consequences.

Rollar v. *Hally*, *supra*.
Hamilton v. *Brown*, *supra*.
Arndt v. *Griggs*, *supra*.
Heidritter v. *Elizabeth Oilcloth Co.*, *supra*.

Tyler v. *Judges of Court of Registration*, 175 Mass. 71; on page 75, the Court says: "Looked at either from the point of view of history or of the necessary requirements of justice a proceeding *in rem* dealing with a tangible *res* may be instituted and carried to judgment without personal service upon claimants within the State or notice by name to those outside of it and not encounter any provisions of either constitution." And, again, "seizure of the *res* is of itself notice to all the world of adverse possession and no further notice need be given".

Bonnemort v. *Gill*, 167 Mass. 338.
Purdon v. *Blinn*, 192 Mass. 387 on page 390.
Nelson v. *Blinn*, 197 Mass. 279.

American Land Co. v. *Zeiss*, 219 U. S. at 67, where the Court said: "The law cannot give personal notice of its provisions to every one. It charges every one with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice where the proceedings affect real estate."

Furthermore, this court has held that constructive notice by publication is good, under the Pennsylvania Statute, in *Cunnius* v. *Reading School District, supra;* consequently the only question open here is whether the notice provided for by the Massachusetts Statute is reasonable.

The notice under the Massachusetts Statute is not necessarily required to be published as many times as under the Pennsylvania Statute, but, on the whole, it would be fully as likely to reach all persons interested. At the very beginning the officer seizes the property, and, if there is land, posts a copy of his warrant thereon and records the same in the Registry of Deeds. It has long been settled that the world has notice of all documents so recorded.

Revised Laws, Chap. 127 and Chap. 198, Sect. 1.
Jordan v. *Farnsworth*, 15 Gray, 517.
Lawrence v. *Stratton*, 6 Cushing, 163 at 167.
Parsons v. *Spaulding*, 130 Mass. 83 at 85.
Dudley v. *Sumner*, 5 Mass. 438 at 469.
Pidge v. *Tyler*, 4 Mass. 541 at 543.

Next the notice is published three times in one or more papers, and a copy thereof posted, on each parcel of land, in two conspicuous places in the town where the absentee last dwelt, also a copy is mailed him at his last address. The proceedings under this law would be likely to attract much more public attention than under the Pennsylvania law, with

a greater probability of actual notice reaching all parties if living, since the moment one begins to disturb property the news of, and gossip concerning, it are likely to travel fast. Under the Pennsylvania Statute the property cannot be disturbed in any way until after the person has been gone at least seven years; and by that time there is much less likelihood of finding the absentee than there would be if proceedings were brought for the appointment of a receiver under the Massachusetts Statute, which may be begun at any time after the party has disappeared, as the essence of the Massachusetts Statute is the care and protection of abandoned property, the ultimate distribution of it being only an incident to such a proceeding, while under the Pennsylvania Statute the ultimate distribution of the property seems to be the chief aim.

Nelson v. *Blinn*, 197 Mass. 279.

Local conditions must govern, and may be very different in different States.

VI.

As to Due Process of Law.

All proceedings under the Statute in question amount to due process of law.

Hurtado v. *California*, 110 U. S. 516 and 537.
Missouri v. *Lewis*, 101 U. S. 22 at 31.
American Land Company v. *Zeiss*, 219 U. S. 47 at 66.
Kentucky Union Co. v. *Kentucky*, 219 U. S. 140.
Cunnius v. *Reading School District*, 198 U. S. 458.
Nelson v. *Blinn*, 197 Mass. 279.

VII.

The fifth amendment to the Constitution cannot apply to this Statute since "it is well established that the first eight articles of amendment to the Constitution of the United

States have reference to powers exercised by the government of the United States and not by those of the States ".

Lloyd v. *Dollison*, 194 U. S. 445 at 447.
Capital City Dairy Co. v. *Ohio*, 183 U. S. 238.
Brown v. *New Jersey*, 175 U. S. 172.
Barron v. *Baltimore*, 7 Peters, 243.

VIII.

If the statute as considered by the State court is constitutional, this Court will follow its construction.

Soper v. *Lawrence Bros.*, *supra*, at p. 370.
Tampa Waterworks Co. v. *Tampa*, 199 U. S. 241–3.
Tioga R. R. v. *Blossburg & Corning R. R.*, *supra*,

where the court said: " The decisions of New York have been uniform and consistent and are binding upon this court, whatever it may think of their soundness on general principle."

Provident Inst. for Sav. v. *Massachusetts*, 6 Wallace, 611, 628, 630.
Morley v. *Lake Shore & Michigan Southern Ry. Company*, 146 U. S. 162.
Equitable Life Assurance Society v. Brown, 213 U. S. 25–43.
Standard Oil Co. v. *Tenn.*, 217 U. S. 413, 440.

IX.

" The legislature is in the first instance a judge of its own constitutional powers and the Court will overrule it only when manifestly wrong."

Adams v. *Howe*, 14 Mass. 340.
Commonwealth v. *Peoples Five Cent Savings Bank*, 5 Allan, 428 at 432.
Commonwealth v. *Interstate Consolidated Street Railway Company*, 187 Mass. 436.

And the practice and usage of successive Legislatures will be considered in constructing constitutional provisions.

President, etc. v. *Apthorp*, 12 Mass. 252.

The history of this Statute should be borne in mind. The first section was passed in 1894; the second, third, fourth, fifth, eighth, ninth and eleventh sections were added in 1897; the sixth, seventh and twelfth sections were added in 1902. Amendments have been made in 1902, 1903, 1904 and 1906. Nearly every year for a period of about ten years some part of this Statute has been before the Legislature, and for over seventeen years it has considered it constitutional and within its police power.

X.

The provisions of Chapter 340 of the Acts of 1907 with reference to deposits in savings banks unclaimed for over thirty years (the validity of which is now pending before this Court, October Term 1910, No. 151, *The Provident Institution for Savings, etc.* v. *Malone, Att'y-Gen.*) is not inconsistent with the above statute.

Malone, Att'y-Gen., v. *Provident Institution for Savings, etc.*, 201 Mass. 23.

This Statute provides that if such deposits are unclaimed for thirty years they shall be paid over to the State. By this Statute the Legislature has provided for a disposition of such deposits in case no proceedings are had under the statute at bar after a delay of thirty years and the provision for the repayment of the fund by the State is not inconsistent with the policy of ultimate distribution under the absentee statute.

XI.

The statute in question meets the requirements laid down in *Cunnius* v. *Reading School District, supra:*

(*a*) Adequate safeguards for the property.

(*b*) Adequate notice.

(*c*) Reasonable length of time.

There is no question but what the defendants in error are the proper persons entitled to receive the property and the fund should be divided equally among them after a proper allowance for costs, expenses, etc., as they are all of the same degree of kindred to the absentee; Revised Laws, Chap. 133, Section 1, Clause 5.

Respectfully submitted,

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APPENDIX.

Public Laws of Pennsylvania (1885), page 155 (found in 1 Purdon's Digest, 13th Ed. Pennsylvania Statutes, p. 1075, Sections 26 to 33, both inc.) as follows:

Sec. 1. Whenever, hereafter, letters of administration on the estate of any person supposed to be dead on account of absence for seven or more years from the place of his last domicil within this commonwealth, shall be applied for, it shall be the duty of the register of wills to whom the application shall be made, to certify the same forthwith to the orphans' court of the county; the said court, if satisfied that the applicant would be entitled thereto, were the supposed decedent in fact dead, shall cause to be advertised, in a newspaper published in the county, once a week for four successive weeks, the fact of said application, together with notice that on a day certain, which shall be at least two weeks after the last of said advertisements, the court will hear evidence concerning the alleged absence of the supposed decedent and the circumstances and duration thereof.

2. At the hearing, the orphans' court shall take such legal evidence as shall then be offered, for the purpose of ascertaining whether the presumption of death is established, and no person shall be disqualified to testify by reason of his or her relationship as husband or wife to the supposed decedent, or of his or her interest in the estate of the person supposed to be dead.

3. If satisfied upon the hearing, that the legal presumption of death is made out, the court shall so decree, and shall forthwith cause notice thereof to be inserted for two successive weeks in a newspaper published in the county, and also when

practicable, in a newspaper published at or near the place beyond the commonwealth, where, when last heard from, the supposed decedent had his residence. The said notice shall require the supposed decedent, if alive, or any other person for him, to produce to the court within twelve weeks from the date of its last insertion satisfactory evidence of his continuance in life.

4. If, within the said period of twelve weeks, evidence satisfactory to the orphans' court of the continuance in life of the said decedent shall not be forthcoming, it shall be the duty of the court to order the register of wills to issue the letters of administration to (the) party thereto entitled; and the said letters, until revoked, and all acts done in pursuance thereof and in reliance thereupon, shall be as valid as if the supposed decedent were really dead.

5. The orphans' court may revoke the said letters at any time, on due and satisfactory proof that the supposed decedent is in fact alive; after which revocation all the powers of the administrator shall cease, but all receipts or disbursements of assets, and other acts previously done by him shall remain as valid as if the said letters were unrevoked; and the administrator shall settle an account of his administration down to the time of such revocation, and shall transfer all assets remaining in his hands to the person as whose administrator he had acted, or to his duly authorized agent or attorney: Provided, nothing in this act contained shall validate the title of any person to any money or property received as widow, next of kin or heir of such supposed decedent, but the same may be recovered from such person in all cases in which such recovery would be had, if this act had not been passed.

Before any distribution of the proceeds of the estate of such supposed decedent, the persons entitled to receive the same shall respectively give sufficient, real, personal security,

to be approved of by the orphans' court having jurisdiction, in such sum and form as the court shall direct, with condition, that if the said supposed decedent shall in fact be at the time alive, they will respectively refund the amounts received by each on demand, with interest thereon; but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest, on security approved by said court, which interest is to be paid annually to the person entitled to it, and the money to remain at interest until the security aforesaid is given, or the orphans' court, on application, shall order it to be paid to the person or persons entitled to it.

6. After revocation of the letters, the person erroneously supposed to be dead may, on suggestion filed of record of the proper fact, be substituted as plaintiff in all actions brought by the administrator, whether prosecuted to judgment or otherwise. He may, in all actions previously brought against his administrator, be substituted as a defendant, on proper suggestion filed by himself, or by the plaintiff therein, but shall not be compelled to go to trial in less than three months from the time of such suggestion filed. Judgments recovered against the administrator before revocation, as aforesaid, of the letters, may be opened on application by the supposed decedent, made within three months from the said revocation and supported by affidavit, denying specifically, on the knowledge of the affiant, the cause of action, or specifically alleging the existence of facts which would be a valid defence; but, if within the said three months, such application shall not be made, or being made, the facts exhibited shall be adjudged an insufficient defence, the judgment shall be conclusive to all intents saving the defendant's right to have it reviewed, as in other cases, by certiorari or writ of error. After the substitution of the supposed decedent as defendant in any judgment, as aforesaid, it shall become a lien upon his real

estate in the county, and shall so continue for the period of five years, as other judgments, unless and until it shall be set aside by the court below, or reversed in the supreme court.

7. The costs attending the issue of letters or their revocation, shall be paid out of the estate of the supposed decedent; and costs arising upon an application for letters which shall not be granted, shall be paid by the applicant.